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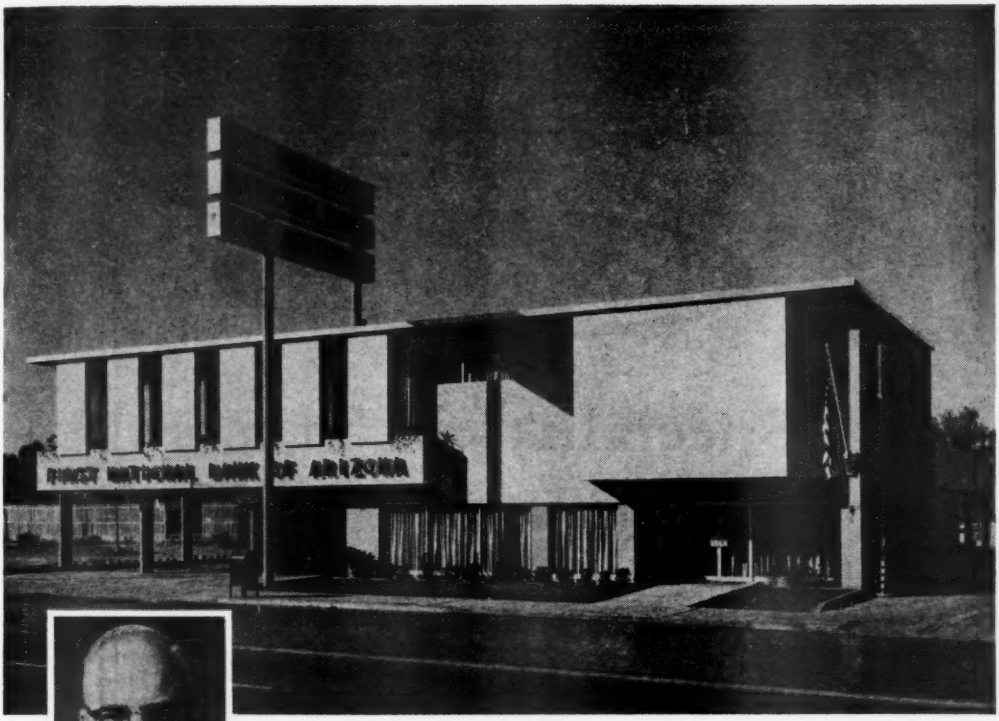

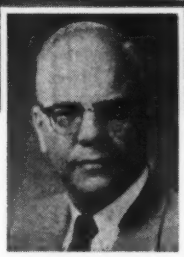

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ARIZONA
LAW REVIEW

VOLUME 2 SUMMER 1960 NUMBER 1

TWO SIGNIFICANT RECENT DECISIONS IN NEGOTIABLE INSTRUMENTS

RALPH W. AIGLER*

(a) Requisites for negotiable instruments

(b) Finality of payment

Whatever doubt there ever may have been that an instrument to be negotiable must contain a promise or order unconditionally to pay money, was put at rest by the N.I.L. It is provided therein—section 1, subdivision 2—that "an instrument to be negotiable . . . . must contain an unconditional promise or order to pay a sum certain in money." Section 3 is an attempt to make clear that certain provisions do not make the order or promise conditional. Those enumerated are (1) "an indication of a particular fund out of which reimbusement is to be made, or a particular account to be debited with the amount" and (2) "a statement of the transaction which gives rise to the instrument." The section concludes: "But an order or promise to pay out of a particular fund is not unconditional."

These declarations, while clear and precise, leave the really difficult questions in this area unresolved. A bill or note, for example, contains language referring to some fund or account. It is possible that the words used may unmistakably mean that the payment is to be made "out of" the fund or account, which would mean that the order or promise was conditional, hence the instrument nonnegotiable because there is the inevitable question, on the face of the document, whether the fund or account has sufficient money in it to pay the amount called for, or whether, on the other hand, the reference amounts merely to a bookkeeping direction. It is on that point that arguments may be long and bitter. Unfortunately, many draftsmen, out of haste or ignorance, so often choose

* See Contributors' Section, p. 86, for biographical data.

words that result in differences of opinion as to their meaning, and often the question is not settled until the courts have given a final answer.

That "a statement of the transaction which gives rise to the instrument," is not offensive to negotiability is as clear as words can make it. But what words in the instrument amount merely to that which the quoted provision permits? The baffling nature of this question is well illustrated by a group of cases involving the meaning and effect of three words, "as per contract." These particular cases are selected because they present the unusual situation of essentially the same question of contruction ruled upon by courts of different jurisdictions.

In *International Finance Co. v. Northwestern Drug Co.*,[1] in 1922, the federal court in Delaware concluded that a bill of exchange drawn by Reolo, Inc. was a negotiable instrument despite the fact that the drawee had accepted it "for payment as per Reolo contract."[2] The quoted words, it was concluded, did not qualify the acceptance; they merely indicated the transaction out of which the bill arose.

Two years later the Court of Appeals of Maryland had before it precisely the same question—another acceptance of one of the Reolo bills. The court was not persuaded by the federal court's conclusion, saying that the words, "as per contract" are embodied in the acceptance and so related to and connected with it that they must of necessity qualify it, and that they in effect make the contract to which they refer so much a part of the acceptance as to impose upon the holder the duty of ascertaining, before purchasing or discounting the bill, that it is payable under the terms of the contract, which, in other words, is to say that they render the acceptance conditional and nonnegotiable.[3]

Then nine years after the Maryland decision another Reolo bill with a similar acceptance was before the Pennsylvania court.[4] The court considered the facts and question before it to be identical with the elements of the controversy in the federal and Maryland cases. It chose to agree with the former rather than the latter, pointing out that nego-

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[1] 282 Fed. 920 (D. Minn. 1922).

[2] Perhaps the court confused the question of negotiability of the bill with the character, absolute or conditional, of the acceptance. Assuming the issuance of the bill before acceptance, the character of the bill as to its absoluteness, therefore its negotiability, would not turn on the freedom of conditions in the acceptance. Under section 47 of the N.I.L. "An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise." The liability of the acceptor, however, depends of course upon the content of his acceptance.

[3] One may wonder whether the Maryland court should have permitted the acceptor's representative to testify, as he did, as to what he meant by the "as per contract" language. The court not only admitted that testimony but obviously was affected by it.

[4] International Finance Corp. v. Philadelphia Wholesale Drug Co., 312 Pa. 280, 167 Atl. 790 (1933).

tiable paper travels as "a courier without luggage" and that "mere words of ambiguity will not restrain its course."[5]

In 1926, an article was published entitled "Conditions in Bills and Notes."[6] Among the types of situations considered therein was that in which the language of the instrument contained a reference to some other document. It was pointed out that according to the cases and the express provisions of the N.I.L. the test was whether the provisions, properly construed, had the effect of qualifying the promise or order. The varieties of words of reference are numerous, and, as is true generally with problems of construction, it is a rare situation indeed in which one may find a reported decision in which all the factual elements were precisely the same as the situation under examination. One of the striking features of the Reolo cases is that one finds there three courts in three states passing on the same facts; their disagreement was not as to the applicable law, but on the construction of language.[7]

An interesting question is presented when the language of the instrument clearly in terms makes the order or promise subject to the provisions of another identified document. Suppose that after examining the paper referred to, the conclusion is clear that nothing therein, even if it were in the note or bill itself, would make the promise or order conditional. Is the note or bill to be classed as non-conditional, hence negotiable? Or is it conditional simply because the question as to whether the note or bill was conditional can be answered only by resort to the other paper? Consider this perhaps fanciful situation: A note otherwise suitable for negotiable status contains the words, "This promise is subject to the conditions and provisions set forth in a document on file with X Bank identified by the letters X Y Z in red ink in the upper left hand corner." Let it be supposed further that on inquiry X Bank states, "Yes, we have such a document." So you take a look at it and find that it is a blank sheet of paper! Is the note negotiable?

In the article referred to above the position taken was that on such facts it should be concluded that the note is not negotiable. It was pointed out that the character of the instrument, as to negotiability, should be determinable in the quick transactions of business without having to examine another paper located perhaps a thousand miles away. The vice

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[5] This attitude would seem to be good sense. If parties choose to put into commercial channels paper that looks on quick inspection to have the negotiable quality, it should not be denied that quality as the result of a, so to speak, microscopic inspection. As the Pennsylvania court said, this presumptive freedom of transferability should prevail until it is "clearly and evidently restrained by its own evident limitations."

[6] Aigler, *Conditions in Bills and Notes*, 26 MICH. L. REV. 471 (1928).

[7] The questioned words, for example, "As per contract" may possibly be conditional or not depending on the sequence of the words, their punctuation, their position in the instrument, etc. A note, for example, reading "As per contract [of such and such date] I promise to pay," etc., may not have the same construction as if it read: "For value received I hereby promise to pay as per contract," etc.

in such instruments is not the condition, but that resort must be had to the other paper in order to determine whether there is one. The situation resembles that of a bill or note payable out of a particular fund in which case the actual status of the fund is not a material factor. So here, the fact of a condition in the paper referred to, or the absence of one, is immaterial. In a very real sense such promise or order is "conditional."

In 1928, the New York Court of Appeals, in the leading case of *Enoch v. Brandon*,[8] gave judicial approval to the doctrine that if the language of reference to another document, properly construed, requires examination of that other paper in order to determine the terms of the *promise or order*, the conclusion is inevitable that it is conditional, quite independently of the terms of the other paper. Andrews, J., stated the court's conclusion on this point in these few words: "If in the bond[9] or note anything appears requiring reference to another document to determine whether in fact the unconditional promise to pay a fixed sum at a future date is modified or subject to some contingency, then the promise is no longer unconditional. What that document may provide is immaterial. Reference to the paper itself said to be negotiable determines its character."[10]

The remaining question before the New York court was one of construction: Did the language in the bonds require an examination of the other document in order to determine the terms of the promise to pay money? That was a question not of law but of the meaning of language, a matter on which one can ill afford to be dogmatic. The court expressed itself on this point in the following terms: "The rule itself is not a difficult one. The trouble, as often happens, lies in its application to particular facts. There is no infallible test as to whether there is a modification of the promise. Because of differences in the words used, or in the ar-

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[8] 249 N.Y. 263, 164 N.E. 45 (1928).

[9] *Enoch v. Brandon*, note 8 *supra*, was a case in which it was necessary to decide whether certain stolen bonds were negotiable. If they were, a bona fide purchaser from the thief had acquired ownership.

The bonds in question were part of a series secured by a trust mortgage. The bonds referred to this mortgage, stating that they were "secured by and entitled to the benefits and subject to [its] provisions," provided for redemption, a sinking fund, etc., all as stated in the mortgage "to which reference is hereby made for a description of the property mortgaged and pledged, the nature and extent of the security, the rights of the holders of the bonds with respect thereto, the manner in which notice may be given to such holders, and the terms and conditions upon which said bonds are issued and secured." As to a further provision in the bonds that they were to be "treated as negotiable," the court said, in substance, that instruments not complying with the requisites for negotiability cannot be made negotiable by such language, though the declaration might have influence in the "construction of doubtful clauses contained in the instrument before the court."

[10] There is authority contra to *Enoch v. Brandon*. In Pollard v. Tobin, 211 Wis. 405, 247 N.W. 453 (1933), the Wisconsin court in concluding that certain bonds were negotiable, took a look at the document to which the bonds referred, and on the basis of its examination of its provisions, concluded that the promise in the bonds was not modified.

rangement of paragraphs, sentences, or clauses, each instrument must be interpreted by itself. Only then may we solve the question as to its character."

Putting aside possible disagreement[11] with the New York court that negotiability is destroyed by the mere fact that the language of the instrument calls for the examination of another document in order to determine the content of the *promise* regardless of the contents of that other document, there would seem to be no reason for any dissent from the view that negotiability in this type of situation is affected only when the words of reference concern the *promise,* if a bond or note, or the *order,* if a bill of exchange.

The conclusion in the *Enoch* case was that the above quoted words in the bonds had application not to the promise to pay but to the security behind the bonds, hence the bonds were ruled negotiable. Any disagreement with the decision must, it is submitted, be not as to the applicable law but to the meaning the court attached to the words in the bonds, a matter of construction.[12]

Some of the cases since the *Enoch* decision involving the same point might be said superficially to be in conflict. In the sense that some instruments have been declared negotiable while some others resembling the former have been pronounced nonnegotiable, the statement may be supported. But remembering what the question really is and also that the words used and the circumstances of their use almost invariably differ, it is a bit far fetched to say that they conflict or that the law is in confusion.[13]

Among the strikingly interesting decisions in this area since the *Enoch* case are *Paepcke v. Paine,*[14] *Merchants Nat'l Bank v. Detroit Trust Co.,*[15] *Detroit Trust Co. v. Detroit City Service Co.,*[16] *Allan v. Moline Plow Co.,*[17] and *Pflueger v. Broadway Trust & Sav. Bank.*[18]

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[11] See note 10.

[12] This is not to say that the conclusion should have been otherwise. Under the circumstances such ambiguity as there was was properly resolved in favor of negotiability.

[13] *See infra,* p. 6. That the question is often a close one is not surprising. The skilled draftsmen who prepare these bonds feel an urge, on the one side, to insert a maximum of protection for the obligors, their clients, while, on the other, they want the instruments to be negotiable, an element to the advantage of the clients.

[14] 253 Mich. 636, 235 N.W. 871, 75 A.L.R. 1205 (1931). The court followed *Enoch v. Brandon,* though, of course, the words used in the bonds were not the same.

[15] 258 Mich. 526, 242 N.W. 739 (1932).

[16] 262 Mich. 14, 247 N.W. 76 (1933). The decisions cited in the two preceding notes were distinguished. See 31 MICH. L. REV. 984 (1933).

[17] 14 F.2d 912 (8th Cir. 1926).

[18] 351 Ill. 170, 184 N.E. 318 (1932). The bonds involved in this litigation were from the same issue as those dealt with in *Paepcke v. Paine, supra,* note 14. The closeness of the question is manifested strikingly by noting that the appellate court reversed the trial court, the supreme court reversed the appellate court and then the supreme court on rehearing reversed itself! The final holding was in accord with the *Paepcke* case.

Finally, we come to the recent federal case, *United States v. Farrington*, 172 F. Supp. 797, decided April 13, 1959. The question was whether certain notes were negotiable. It was contended that they were not, since they contained language making them subject to the terms of a certain loan agreement. The party making that contention could not, however, point to anything in that agreement that imposed any contingency upon the promise in the notes. The court concluded that the notes were not negotiable, saying that "there is a considerable body of authority to the effect that if the instrument contains the phrase 'subject to' the terms of another document, or words to that effect, the reference is fatal to negotiability regardless of the actual provisions of the other document," citing *Enoch v. Brandon* (supra note 8); *Davis v. Union Planters Nat'l Bank & Trust Co.*;[19] Annotation, 104 A.L.R. 1378, 1379, and the article in 26 *Mich. L. Rev.* 471, referred to above.[20]

Recognizing that these are decisions, many of them concerning corporate bonds, concluding that their negotiability was not destroyed by terms in the bonds incorporating provisions in an underlying mortgage or deed of trust "designed to secure the obligation of the primary instrument," the court said that the principle (above set forth) has apparently been modified in some jurisdictions.[21] "In such cases," the court added, "it is said that making the note or bond subject to the provisions of what is clearly an agreement regarding collateral security in no way 'restricts, or burdens with conditions, the absolute promise to pay' contained in the instrument."

The fact that in the process of construction courts have varied in the weight to be given to varying factors hardly warrants the statement, quoted by the court in the *Farrington* case, from Brannan, *Negotiable Instruments Law* 256-59 (7th ed. 1948), that the "cases on the point are now in hopeless confusion." Such confusion as there seems to be is not regarding the law, but the meaning of words. If it is concluded that the language used means that the *promissory undertaking* in the bond to pay the stated sum of money is, or may be, qualified by what appears in the mortgage or other identified paper, then the law seems clear that negotiability is absent. And it seems sensible that the vice that brings about that result is not in what the other document contains but in the

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[19] 171 Tenn. 383, 103 S.W.2d 579 (1937).

[20] In a footnote appended at that point this court says that the meaning of the UNIFORM COMMERCIAL CODE (Mass. G.L.C. 106) § 3-105(2)(a) would seem to be the same.

[21] No doubt courts have shown a reluctance to read language in the bond referring to the securing mortgage, as subjecting the promise to pay to provisions in the mortgage; the tendency, when there is any ambiguity whatever, is to look upon the reference as affecting only the rights of the bondholder in respect to the security. Perhaps *Enoch v. Brandon* itself is a good example of this disposition. But this is a matter of construction, not a modification of the "principle."

mere fact that the other paper must be examined. The recent federal case, in its conclusion, seems eminently sound on that point.

The other recent decision that suggests the caption of this paper is *Kansas Bankers Sur. Co. v. Ford County State Bank*, decided April 11, 1959, by the Kansas Supreme Court.[22] This case has no bearing upon elements of negotiability; it deals with the position of a drawee of a bill, here a check, after paying out money thereon which the order, as issued by the drawer, did not call for, but which by wrongful alteration it appeared to call for.

The check as issued called for $90.20, but it had been altered by the payee to call for $14,000. It was cashed by the defendant bank which in turn presented it to the drawee bank with an indorsement "all prior indorsements guaranteed." The payment of $14,000 by the drawee was charged to the account of the depositor-drawer. When the fact of alteration was discovered, the drawee, as it was bound to do, reimbursed the drawer with the difference between $14,000 and $90.20. The plaintiff, which had insured the drawee against such losses, then paid the drawee the amount of its loss and took a subrogration receipt therefor. The suit which was settled by the supreme court was by the insurance company, as subrogee, against the defendant bank to which the drawee had paid the $14,000. The question was recognized as a new one in Kansas.

After pointing out that the N.I.L. was intended to bring about uniformity, to cover the entire field of negotiable instruments, and to be applied as written, the court rejected the contention that the presenting bank, the defendant, had incurred liability either on its express warranty[23] or on those specified in sections 65 and 66 of the N.I.L.[24] The court seems to inquire what were the obligations of the drawee bank. Were they what the instrument called for on its issuance, or what it was when presented?[25]

Just what the court was getting at in this reference to the "obligation" of the drawee bank is not entirely clear. The question in the case was not the *liabilities* of the drawee, but its *rights* against the presenter.

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[22] 184 Kan. 529, 338 P.2d 309 (1959).

[23] The express warranty was merely a guaranty of "indorsements."

[24] The court would seem to have been on wholly sound ground when it pointed out that these warranties arise out of a sale, and that presentment to the drawee for payment followed by payment is not a sale or negotiation. Security Sav. Bank v. First Nat'l Bank, 106 F.2d 542 (6th Cir. 1939). But compare the language of Mr. Justice Douglas in Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[25] The court said that "we think it was not the legislative intent that the obligation of the drawee bank paying a negotiable instrument should be limited to the tenor of the instrument as drawn by the maker, as was the rule at common law, but that it should be enforceable in favor of a holder in due course against the drawee bank paying such instrument according to its tenor at the time of its payment." The court failed to notice that in the absence of an acceptance, the drawee is under no obligations on the instrument to holders of it.

The only liability owed by the drawee was to its depositor to pay his checks when his credit balance was sufficient and, in this case, to restore to the credit of the depositor-drawer payments not made in accordance with his genuine orders. As will appear infra, the court took the position that payment by the drawee amounted to an acceptance, so possibly it meant that the obligation of the paying drawee was that of an acceptor. That, however, seems more than a little strange, for acceptance is a *promise* to pay. Then how can payment, which is an act, be treated as a *promise to pay*?

Strange as this line of thought may seem to be to the casual reader, it derives seeming support from the fact, as will appear herein later on, that the court clearly does view payment as amounting to acceptance, at least under section 62 of the N.I.L.

Greedy people with substandard senses of honesty have often used negotiable instruments as devices for getting supposedly easy money. One method involves forging the signature of a responsible person to a bill of exchange, normally a check,[26] as drawer; another is getting hold of an issued instrument and then forging the signature of the person to whose order it is payable, as endorser; still another is to alter an existing instrument by raising the amount, or perhaps by changing the name of the payee. The instrument may or may not be presented to the drawee for acceptance or certification. At any rate, ultimately, it is presented to the drawee, usually through another bank or a business house, and the payment is charged to the account of the actual or apparent drawer.

When the person whose account has thus been charged learns of it he notifies the drawee and insists that the charge, not made in accordance with his genuine order,[27] must be reversed. Assuming he was not at fault, his demand must be carried out. The drawee then looks about for someone to whom it may shift the loss, and this leads often to a suit against the presenter to whom payment was made. The reported cases of this sort are numerous. Putting aside the instances in which the presenter is found to have made a warranty which has been breached, the only basis on which recovery can be predicated is that the payment was made by mistake.

The Kansas court properly states that, "Before the adoption of the N.I.L. the ordinary principles of payment under a mistake of fact were applicable to negotiable instruments." Where money or goods have passed

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[26] Such forgeries and alterations are not necessarily limited to bills. Notes may be used, but then the ultimate question is apt to be somewhat different.

[27] If the forgery was of the drawer's signature, it is clear that the order was not genuine. If the forgery is of an indorsement, an essential element in the chain of title, the drawee has honored a genuine order, but the payment was to the wrong party, hence not according to the drawer's order. If the instrument was altered as to amount, again the payment was not according to his order; and if the alteration was, for example, in the name of the payee, the same is true.

from one to another under the influence of a mistake as to a pertinent fact, retention thereof, if allowed, would mean an "unjust enrichment" which in good conscience should not be allowed. Probably the establishment of the doctrine of recovery to prevent such enrichment is to be attributed largely to Lord Mansfield. It is, therefore, peculiarly interesting and significant that in *Price v. Neal*, in 1762, that eminent jurist refused to allow recovery of money paid by the drawee-plaintiff to the defendant-presenter, the payment having been made under the mistaken belief that the bills bore the genuine signature of the drawer.[28] One of the two forged bills which had been paid by the plaintiff had been accepted prior to its payment. This means, no doubt, that if the plaintiff-drawee had refused to honor his acceptance when payment was later demanded and he had been sued on his acceptance, a defense based on the forgery would have been ineffective.[29]

In the United States, while opinions differed as to the merits of *Price v. Neal* and some courts refused to apply its doctrine, it became a part of the body of law of many states.[30] In 1849, the legislature in Pennsylvania declared (56 P.S. § 29) that money paid on an instrument that turns out to be a forgery may be recovered.

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[28] The attorney for the plaintiff in Price v. Neal, 3 Burr 1354 (K.B. 1762) must have felt, when he learned that Lord Mansfield was to decide it, that he had his case nearly won!

Many students of the subject have been puzzled as to why Lord Mansfield concluded that the usual principle of recoverability of money paid by mistake should not apply to the facts of *Price v. Neal*. His opinion leaves one in doubt—he stopped the defendant's attorney in the midst of his argument with the observation that "this was one of those cases that could never be made plainer by argument." The most commonly accepted explanation is that given by Mitchell, J., in Germania Bank v. Boutell, 60 Minn. 189, 62 N.W. 327 (1895), in short, commercial expediency. That learned judge said in that case: "In view of the use of this class of paper as money [bills of exchange], it was considered that public policy required that as between the drawee and good faith holders, the drawee bank should be deemed the place of final settlement, where all prior mistakes and forgeries should be corrected and settled once and for all, and if not then corrected, payment should be treated as final." This view is relied on in the RESTATEMENT, RESTITUTION § 30 (1937).

[29] In fact such a case had been before the English court nearly fifty years before *Price v. Neal*, *supra* note 28. See Jenys v. Fawler, 2 Strange 946 (1715).

Having determined in the *Jenys* case that forgery of the drawer's signature was no defense to an action on such acceptance, it would have been remarkable if it had been held that what was not available as a defense was effective as a ground for recovery of the money paid in performance of such promise. And if the payment in pursuance of the acceptance promise was not recoverable, clearly payment without such promise should likewise be non-recoverable. *Price v. Neal*, *supra*, note 28, amounted to that. In that sense payment left the parties in precisely the same position as did acceptance. Whether payments can be said, then, to be the equivalent of an acceptance, so that statutory provisions, for example, declaring the effect of acceptances, are to be implicitly applicable also to payments, is, however, quite a different question, as shall be pointed out *infra*.

[30] Extravagant opinions, pro and con, as to the doctrine may be found in Bank of Williamson v. McDowell County Bank, 66 W.Va. 545, 66 S.E. 761 (1910); First Nat'l Bank v. Brule Nat'l Bank, 38 S.D. 396, 161 N.W. 616, 12 A.L.R. 1079 (1917), *aff'd on rehearing*, 41 S.D. 87, 168 N.W. 1054 (1918), and First Nat'l Bank v. Bank, 15 N.D. 299, 108 N.W. 546 (1906).

It must be noted that the *Price v. McNeal* doctrine, an exception to the general rule that money paid by mistake is recoverable, does not preclude the application of the general rule to other fact combinations involving negotiable instruments. For example, a depositor issues a check payable to the order of a named payee; a scalawag gets possession of the check and after forging the indorsement of the payee gets it cashed at the defendant bank which in turn presents it to the drawee bank and gets the money, both banks acting in innocence of the fact of forgery. When the drawee sues the presenting bank to which the money had been thus paid by mistake, does the case call for the general rule, or the exception? In the leading case of *Canal Bank v. Bank of Albany*[31] recovery was allowed.[32]

To disallow recovery in the case of forged indorsement would tend to clog rather than to expedite the use of the negotiable instrument in place of money. Note the language of Mitchell, J., quoted in note 28 *supra.* If drawee banks had to face the facts that payments made to presenters that are not owners were at their peril—not chargeable to the drawer's account and not recoverable—the tendency on their part might well be to demand a certificate of title, as in land transactions. In *Price v. Neal* the forged signature was of one not only known to the drawee but with whom he was in a business relation, while in the *Canal Bank* case the forgery was of the signature of a stranger. The risk of payment in the former situation may well be placed upon the drawee,[33] while in the latter it would be unfair to do so.

What other situations are there in which it is reasonable to conclude that the drawee in making payment should take the risk, as in *Price v. Neal,* of a mistake as to a material fact. Obviously he does not take the

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[31] 1 Hill 287 (Sup. Ct. N.Y. 1841).

[32] In Security Sav. Bank v. First Nat'l Bank, 106 F.2d 542 (6th Cir. 1939), the court said: "There is general agreement that, even without an express guaranty of prior indorsements, a drawee who pays a check without knowledge that an essential indorsement has been forged, may recover from either the holder paid or a prior indorser, if guilty of no negligence that is injurious to the defendant after discovery of the forgery [citing many cases] . . . . Even those who criticise the implied warranty theory upon which recovery is allowed against the last holder concede that the drawee may recover from such party as for money paid under mistake of fact."

[33] Sometimes it has been said that the reason for the result in *Price v. Neal, supra,* note 28, was that a drawee is bound to know the signature of his drawer. That, however, would more properly be said to be the result of that case. In National Metropoliton Bank v. United States, 323 U.S. 454 (1945), Mr. Justice Black said that the reason for the exception [that represented by *Price v. Neal*] is that a drawee is required to be familiar with a drawer's signature; if therefore the drawee pays to an innocent presenter on a forged drawer's signature, it has been held that the drawee's right to the money is not superior to that of the innocent presenter."

In the comments appended to section 3-417 on p. 310 of the 1957 Official Text of the UNIFORM COMMERCIAL CODE it is said:

"The justification for the distinction between forgery of the signature of the drawer and forgery of an indorsement is that the drawee is in a position to verify the drawer's signature by comparison with one in his hands, but has ordinarily no opportunity to verify an indorsement."

risk as to genuineness of essential indorsements. What, though, should be the drawee's situation when he pays under a mistake as to the status of the drawer's account?[34] What if the mistake is regarding there being a stop-payment notice on file?[35]

If the payment is made under the mistaken belief that the amount is what the instrument originally called for, into which category should the situation fall? Along with *Price v. Neal*? Or with *Canal Bank v. Bank of Albany*? In *Savings Bank v. National Bank*[36] it was taken for granted that in such case the drawee was entitled to reimbursement. In *United States v. National Exchange Bank*,[37] the court said that prior to the N.I.L., "the general rule in this country was that, when a check or draft had been fraudulently altered after issue, and had been paid by the drawee in accordance with its altered tenor, the latter, if he were not also the drawer of the instrument, could recover from him to whom payment had been made although the last named might have paid full value for it and was not chargeable with any fault either of omission or of commission, *White v. Continental Nat'l Bank*, 64 N.Y. 316, 21 Am.Rep. 612." The court rejected the plaintiff's claim to recover, because it was both drawer and drawee, and the conclusion was affirmed by the Supreme Court.[38]

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[34] The following cases indicate the answer that may be given to the question: Chambers v. Miller, 13 C.B.N.S. 128; Riverside Bank v. First Nat'l Bank, 74 Fed. 276 (2nd Cir. 1896); Hallenbeck v. Leimert, 295 U.S. 116 (1935); Smith v. Hubbard, 205 Mich. 44, 171 N.W. 546 (1919); Oddie v. Nat'l City Bank, 45 N.Y. 735, 6 Am.Rep. 160 (1871); Dillaway v. Northwestern Nat'l Bank, 82 Ill.App. 71 (1899); Merchants Nat'l Bank v. National Eagle Bank, 101 Mass. 281, 100 Am.Dec. 120 (1869); Bankers' Trust Co. v. United States Register Co., 200 Iowa 1014, 205 N.W. 838 (1925); National Bank of Commerce v. Baltimore Com. Bank, 141 Md. 544, 118 Atl. 855, 29 A.L.R. 135 (1922); State v. Scarlett, 91 N.J.L. 200, 102 Atl. 160, 2 A.L.R. 83 (1917); Metropolitan Life Ins. Co. v. Bank of United States, 259 N.Y. 365, 182 N.E. 18 (1922); Akron Scrap Iron Co. v. Guardian Sav. & Trust Co., 120 Ohio St. 120, 165 N.E. 715 (1929); First Nat'l Bank v. Noble, 179 Ore. 26, 168 P.2d 354, 169 A.L.R. 1426 (1946).

[35] Among the cases bearing on this, see National Loan & Exchange Bank v. Lachovitz, 131 S.C. 430, 128 S.E. 10, 39 A.L.R. 1237 (1925); Smith & McCrorkin v. Chatham Phenix Nat'l Bank, 239 App. Div. 318, 267 N.Y.S. 153 (1933), where, however, the party collecting acted fraudulently; National Boulevard Bank v. Schwartz, 175 F. Supp. 74 (S.D.N.Y. 1959), where the recipient knew at the time of payment that there was a stop-payment order; Foster v. Federal Reserve Bank, 29 F. Supp. 716 (E.D. Penn. 1939), noted in 53 HARV. L. REV. 668, *aff'd* in 113 F.2d 326, but applying Pennsylvania law; National Bank v. Berrall, 70 N.J.L. 757, 58 Atl. 189 (1904); Miller v. Chatham & Phenix Nat'l Bank, 126 Misc. 559, 214 N.Y.S. 76 (1926). In Chase Nat'l Bank v. Battat, 297 N.Y. 185, 78 N.E.2d 465 (1948), the drawee which had paid despite a stop payment order, sued, in the alternative, both the drawer and the recipient of the payment.

In relation to the problem to which this and the preceding note refer, see also note 33.

[36] 3 F.2d 970, 39 A.L.R. 1374 (4th Cir. 1925).

[37] 1 F.2d 888 (4th Cir. 1924).

[38] 270 U.S. 527 (1926). The court rejected the plaintiff's contention that so many checks are drawn by so many people on the Treasury of the United States that the drawer and drawee should be considered as separate persons.

If the maker of a promissory note pays to the holder, an innocent party, the amount to which the note has been raised, he cannot recover on the basis of mistake; he should have known what his note really called for.

From the foregoing, presumably one may get an idea regarding the law of mistake in the setting of a negotiable instrument as it developed uncontrolled by statute. Now the N.I.L. must be examined. No one has ever pointed to anything in that legislation that should drive a court that had applied *Price v. Neal* to change its position. But a lot of opinions to the effect that the section referred to below affirms the doctrine have been expressed.[39]

The N.I.L. was designed to make uniform throughout the states the law of negotiable instruments. Is the recoverability of payments made by mistake a subject that might reasonably be expected to be dealt with in such legislation? Or is it merely a problem that may at times arise out of the use of such instruments?

Those who claim that the N.I.L. has a direct bearing on our mistake problem point to section 62, which is found in article V, dealing with Liabilities of Parties. Section 62 deals specifically with acceptors, in the following terms:

> The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits—
>
> 1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
>
> 2. The existence of the payee and his then capacity to indorse.

The language about admission of the genuineness of the drawer's signature reminds one at once of *Price v. Neal* in which one of the bills ultimately paid by the plaintiff-drawee had been accepted. The other bill in that case was paid on presentment, without "acceptance."

Referring to the Pennsylvania statute of 1849, stating that money paid on an instrument that turns out to be a forgery may be recovered back, thus repudiating *Price v. Neal,* Professor Henning, in 59 *U. Pa. L. Rev.* at p. 498, expressed the opinion that section 62 of the N.I.L., when it became law in Pennsylvania, repealed the Act of 1849. He thought it unthinkable that an acceptor of a bill should be precluded from denying the genuineness of the drawer's signature and thus be compelled to pay, yet be in position to turn about and succeed in an action to recover the money he had paid. But in *Union Nat'l Bank v. Franklin Nat'l Bank,*[40] the court held that since the drawee-plaintiff had *paid* the bill,

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[39] In Cherokee Nat'l Bank v. Union Trust Co., 33 Okla. 342, 125 Pac. 464 (1912), the court abandoned its earlier rejection of *Price v. Neal,* in deference to the N.I.L. The Massachusetts court concluded that *Price v. Neal* was part of the state law, not because the N.I.L. had been enacted there but because it was sound common law. South Boston Trust Co. v. Levin, 249 Mass. 45, 143 N.E. 816 (1924).

[40] 249 Pa. 375, 94 Atl. 1085 (1915).

though it was a forgery, without any acceptance, section 62 had no application; the case was decided by applying the Act of 1849. The Massachusetts court that decided the case noted in note 39, obviously would agree with this Pennsylvania decision. There is, then, very respectable authority that section 62 has application only when there has been an actual acceptance.

Two striking decisions, one in Illinois,[41] the other a bit later in California,[42] relied on section 62 as changing generally accepted law. The reliance in those cases was on the provision that "the acceptor by accepting the instrument engages he will pay it according to the tenor of his acceptance." The litigation in each case arose out of the alterations of a check by erasing the name of the payee and substituting another name. The substituted payee got a certification by the drawee and then negotiated the instrument to an innocent party who on presentment to the drawee-acceptor got the money called for. When the drawer of the check learned these facts, he insisted that the drawee recredit his account, which was done. The action was by the drawee-acceptor to recover the money from the presenter.

In each case the court recognized that without the N.I.L. (Sec. 62) the recovery, under the law, would be allowed. But in each case it was concluded that the language just quoted from section 62 had changed the law. The California court said:

> The editors of the American Law Reports Annotated, vol. 22, p. 1162, express the view that the conclusion reached in the Illinois case is more in accord with the language of the Negotiable Instruments Law than the other cases cited, and, as said by Prof. Brannan in his work on the Negotiable Instruments Law (4th Ed.) at page 567: "It is difficult to see how he (the acceptor) can escape liability if any meaning is to be given to the words 'engages that he will pay according to the tenor of his acceptance.' The tenor of the acceptance is determined by the terms of the bill as it is when the drawee accepts and that is a bill for the raised amount. That is the bill he accepted and no other, and according to its tenor he has engaged that he will pay it."

Possibly the law applicable to such facts should be the way it thus came to be in those two states.[44] Regarding this the California court said:

> This conclusion is in harmony with the law of England and the continental countries, 14 Harvard Law Review, 241, 243; Langton v. Lazarus (1839, Exch.) 5 M. & W. 628; 1 Pardessus, Cours de Droit

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[41] National City Bank v. National Bank, 300 Ill. 103, 132 N.E. 832, 22 A.L.R. 1153 (1921).

[42] Wells Fargo Bank & Union Trust Co. v. Bank, 214 Cal. 156, 4 P.2d 781 (1931).

[43] The California court relied on the Illinois decision.

[44] In 4 HARV. L. REV. 297, Dean Ames, before the N.I.L., contended that upon principle an alteration before acceptance of any of the terms of a genuine bill should not affect the liability of the acceptor to an innocent holder.

Commercial (6th Ed. 1856) 545. It makes for the usefulness and currency of negotiable paper (31 Yale Law Journal, 522, 527) without seriously endangering accepted banking practices, for banking institutions can readily protect themselves against liability on altered instruments either by qualifying their acceptance or certification[45] or by relying on forgery insurance and special paper which will make alterations obvious.

But the question, call it technical or not, remains: Is the language of section 62, relied on, sufficiently clear to support the conclusions, remembering that the N.I.L. was designed not to effect law reform but to codify generally accepted existing law?[46] At any rate, the statement quoted above from Professor Brannan that the conclusion was inevitable "if any meaning is to be given to the words 'engages that he will pay according to the tenor of his acceptance'," will not stand examination.

The N.I.L. recognizes that acceptances are not all absolute; there are qualified acceptances; and the obligation of the acceptor thus may vary. The framers of the act, therefore, would have been grossly obtuse if in stating the engagements of the acceptor, they had not used just about the wording they did use. In other words, the language of section 62 had a proper place in the act even though it did not change the then generally accepted law of mistake.[47] One may also ask: Why did they add the words, "according to the tenor," etc.? If they meant merely that the acceptor engaged to pay as presented, there was no real point in adding the words just quoted.

Since in both the Illinois and California cases the checks were certified, the question was whether under section 62, *assuming it was applicable,* the engagement of the acceptor was to pay according to the original "tenor" or the altered "tenor." That it should be the latter certainly was not completely unreasonable.

But what about a check fraudulently altered as to amount which is *paid* without previous certification. Is the drawee prevented from recovery, which would have been allowed before the N.I.L., by reason of section 62 of the N.I.L.? That was the question in the recent Kansas case.

In that case the court said: "It is difficult to see how a drawee bank

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[45] The drawee, with the law thus established in Illinois and California, would be likely to accept or certify only at the drawer's request, or qualify the undertaking so as to read, for example, "Certified. Payable only in accordance with original tenor." Under the UNIFORM COMMERCIAL CODE, *however,* such qualifying words would have to be ignored. Section 3-417(1)(c). One may wonder whether such qualifications are so offensive to public policy and interest as to warrant their destruction. (Footnote by the author).

[46] Both courts cite a great many cases establishing the law before the N.I.L.

[47] The two cases evoked a lot of comment. See, for example, 22 COLUM. L. REV. 260; 16 ILL. L. REV. 615; 27 *Ibid.* 519; 35 HARV. L. REV. 749; 31 MICH. L. REV. 408; 31 YALE L.J. 522.

which pays a raised, but otherwise genuine instrument, to an innocent holder can escape liability if any meaning is to be given the words "engages that he will pay it according to the tenor of his acceptance . . . ." The answer seems pretty obvious. The drawee by paying makes no promises; he is under no liability to "escape," at least so far as holders or presenters of the bill are concerned. Payment is an act, not a promise. An acceptor, it is true, makes promises and incurs liabilities. Just what his promise is *was*, for Illinois and California, settled by those two cases. But on those checks the drawee had become a certifier, thus a promisor. In the Kansas case there was no pretense of a promise, no engagement, hence section 62 had no application.

It may, of course, be urged that if a *promise* by the drawee forecloses him from denying liability when sued on that promise, then a *payment* by him should likewise preclude him from maintaining a quasi contractual action to get back what he paid. The answer is that the statutory language relied on as changing the law limits its operation to acceptances.[48] It may well be that such restricting effect of the statute was fully intended, for the typical case raising the question is one in which the instrument has been in circulation after the acceptance. After payment the instrument is dead, a mere voucher.

If the idea is that a payment amounts to acceptance, thus bringing section 62 into operation, the answer would seem to be: (1) acceptance is a promise looking forward to payment, (2) payment is the ultimate act that retires the instrument. By no stretch of the imagination, can it be said that the drawee by the act of paying, thus retiring the instrument, has engaged to pay it according to the tenor of his acceptance, or in any other way. Besides, the real question was regarding the *rights* of the paying drawee, not his *duties*, as a result of his promises, to holders of the instrument.

When it is said, as it often is, that payment by the drawee of a bill or check includes an acceptance of it, what is probably meant is that the payor, before he pays, finds the instrument *acceptable* for payment.

It is true that not a few courts have used language to the effect that section 62 is a preservation or adoption of the *Price v. Neal* doctrine. Half of that case involved an acceptance, hence section 62 in dealing with the effect of acceptance was in terms applicable to *Price v. Neal*. As to the other half of the case, at least the N.I.L. nowhere purports to change it. Only occasionally have courts found anything in section 62 that required them to abandon their earlier repudiation of *Price v. Neal*.[49]

To many it may seem that the two courts were carried away by their desire to change the established law. See *supra*, note 29.

[48] On this the Pennsylvania case cited in note 40, *supra*, is interesting.

[49] See note 39, *supra*.

The subject should not be dismissed without referring to section 137 of the N.I.L. That section states in substance that when a bill has been delivered to a drawee "for acceptance," a refusal by him within twenty-four hours or such other period as the holder may allow, to return the bill accepted or non-accepted, is deemed to amount to an acceptance. Most of the difficulties in such situations have turned on whether mere retention, or failure to return, amounts to a "refusal" to return. But courts have expressed conflicting views as to whether section 137 has *any* application when the bill is presented for *payment*.

When the Kansas court concluded that payment came within acceptance for the purposes of section 62, it was finding in that section a distinct change in the law. When a court concludes that presentment for payment is covered by presentment for acceptance dealt with in section 137, it is not finding a clear change in the law, but rather a result in keeping with what the non-statutory law may have been.

Then, too, the question of construction is quite different when considering section 62 by comparison with section 137. The former says that an acceptor engages, etc. The latter states that certain results follow presentment for acceptance. The latter is a more generalized expression.

Finally, how would the Kansas case result if the Commercial Code were the law. Section 3-418 states in sweeping terms that payment or acceptance, with certain exceptions, "is final in favor of a holder in due course," etc. The exceptions include the liabilities for breaches of warranty on presentment as set forth in section 3-417. This latter section declares that in the absence of agreement "any person who obtains payment or acceptance . . . warrants to a party who pays or accepts in good faith (a) that he has good title to the instrument . . . and (b) that he has no knowledge of any effective direction to stop payment; and (c) that the instrument has not been materially altered," etc. So if Kansas should enact the Code, the case under examination goes out. The Code in section 3-417 goes on to declare in substance that a presenter does not warrant non-alterations that may have been made prior to an "acceptance." It thus adopts the views applied in the Illinois and California cases. See note 45, *supra*.

AN ADMINISTRATIVE PROCEDURE ACT FOR ARIZONA

RAY JAY DAVIS*

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[1]

Need for effective governmental policing of our economy has produced a myriad of federal, state, and local administrative agencies. They, however, never have been free from a rousing din of complaints concerning their deficiencies as instruments of governmental control of the governed and their comparative imperviousness to legislative, executive, and judicial efforts to guide them with effect.[2] Past critics "zeroed-in" on the means by which governmental power was transferred to agencies; they invoked the political doctrine of non-delegability of legislative and judicial functions. Anti-delegation arguments, excluding a scattering of successes,[3] generally failed,[4] and today are not often seriously meant.[5] Disparagers of the administrative process, prior to the Second World War, also dwelt upon the availability and extent of judicial review of agency actions.[5] Since that time, with the more widespread recognition that judicial review constitutes but one small part of the process of executive government,[6] this complaint has been softened.

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* See Contributors' Section, p. 86, for biographical data.

[1] THE FEDERALIST No. 51, at 323 (Lodge ed. 1888) (Hamilton or Madison).

[2] It has been maintained that, although on the whole agencies do a fair and efficient job, they "are usually beyond any systematic control by legislature or by executive," and that "judicial review of most agencies can operate only at the edges and not at the center of the administrative process." Gardner, *The Administrative Process*, 3 COLUM. L. ALUM. BULL. 11, 12 (1958).

[3] See, *e.g.*, A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); State v. Marana Plantations, 75 Ariz. 111, 252 P.2d 87 (1953).

[4] For recent Arizona cases approving delegations of legislative power, see State v. Wacker, 86 Ariz. 247, 344 P.2d 1004 (1959); State Bd. of Technical Registration v. McDaniel, 84 Ariz. 223, 326 P.2d 348 (1958); State v. Beadle, 84 Ariz. 217, 326 P.2d 344 (1958); Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955). *But cf.* Giss v. Jordan, 82 Ariz. 152, 309 P.2d 779 (1957).

[5] American courts, however, still adopt a "belligerently hostile attitude toward attempted delegation of the legislature's power to impose taxes." GELLHORN & BYSE, ADMINISTRATIVE LAW 145 (1954). In the recent Arizona case of Climate Control, Inc., v. Hill, 86 Ariz. 180, 342 P.2d 854 (1959) the state supreme court refused to interpret a statute in a fashion that would empower an agency to impose a tax. To do so would make the enactment unconstitutional as a delegation of legislative power.

[6] See,*e.g.*, two of the most exhaustive studies of government by agencies. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 15 (1952); ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 75 (1941).

Today popular press accounts of agency bobbles and peccadillos peal forth "with no abatement of yesteryear's volume."[7] The targets, though, are not those of the past; administrative personnel, lack of effective regulatory power or of willingness to employ it, and stagnant or unfair procedures are the butts of current criticism. Personnel, particularly members of boards, bureaus, and commissions, have been accused of sins running the gamut from ineptitude[8] to downright dishonesty.[9] Agencies have been castigated for failure to curb offensive advertising, payola, quiz show rigging, union mismanagement, aircraft collisions, unemployment compensation cheating, and the like.[10] Such complaints are sometimes specifically aimed at absence of administrative power to deal with the segments of our economic life committed to the bureaucrats;[11] but lately they have more often been directed toward lack of will to use existing powers.[12] Procedural objections center around the Bleakhousian lassitude demonstrated by governmental agencies[13] and "unfair" procedural ploys used by them.[14]

Certainly it would be foolhardy to suggest a panacea for these ills of bureaucracy—or, for that matter, even to advocate a series of patent medicines guaranteed to cure-all. It is submitted, nevertheless, that procedural reform is a potential remedy for many existing evils. Codes of fair procedure, of course, cannot in and of themselves usher in a millennium of governmental loving kindness and efficiency;[15] they can, how-

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[7] GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 4 (1956).

[8] Administrative agencies today have all too often become patronage plums for distribution to needy (defeated) officeholders and deserving (unemployed) political hacks. Their lack of the specialized knowledge "bestowed on the administrative agency by judicial fiat" has been widely condemned. Nevertheless their unearned quality of expertise apparently has awed litigants to the extent that a commentator on the administrative scene has remarked the he knew of no " . . . instance in which a litigant has yielded to the temptation to submit evidentiary proof to the contrary." Colum. L.S. News, Nov. 26, 1958, p. 4, col. 3 (quoting Warner W. Gardner).

[9] In Arizona dishonesty in office has been alleged recently against a former chairman of the Pima County Zoning Commission and fraudulent and dishonest election practices have been charged in respect to an election for corporation commissioner.

[10] Criticisms of this sort have lead to several resignations of federal administrative officers. They, more constructively, have also lead to passage of better regulatory legislation. See *e.g.*, Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959), 29 U.S.C.A. §§ 401-531 (Supp. 1959); Federal Aviation Act, 72 Stat. 731 (1958), 49 U.S.C.A. §§ 1301-1542 (Supp. 1959).

[11] See, *e.g.*, Gilmore, *The Scandal of Unemployment Compensation*, The Reader's Digest, April 1960, p. 37 at p. 43 (suggestion that jurisdiction over the whole area of unemployment compensation be lodged in the federal government).

[12] See, *e.g.*, Clark, *Must TV Bring the Bathroom Into Our Living Rooms?*, The Reader's Digest, April 1960, p. 63.

[13] See, *e.g.*, N.Y. Times, March 23, 1958, § E, p. 6, col. 1; Time, March 17, 1958, p. 100, col. 2.

[14] To many commentators on administrative law this is ". . . *the* matter most worth studying and fighting over . . . ." Jaffe, Book Review, 54 HARV. L. REV. 367, 370 (1940).

[15] It has been asserted that apparently adequate procedural safeguards in some instances have served merely as window dressing for government through political pressure. Harv. L. Record, April 3, 1958, p. 1, col. 4, at p. 3, col. 1 (reporting a speech by Bernard Schwartz).

ever, help create an atmosphere in which competent men would be willing to serve,[16] a gauge by which administrative performance can be measured, and a means whereby powers can be utilized as legislators intended they should.

The approach to procedural improvement in the United States, until the 1930's, was limited to judicial imposition of minimal constitutional standards of procedural performance and haphazard modifications of the particular statutes under which the various agencies operated. Since that time, though, general administrative procedure legislation has been advanced as an additional mode of reform. Such overall regulation has its admitted drawbacks when sought to be applied to agencies with diverse origins and dissimilar functions.[17] Certainly procedural laws should not be so concrete as to work hardship and should not be so limited as to fail to take into account diversity. No one would argue today, for stepping back from general procedural legislation to the past system.[18] Regulation covering the activities of most, if not all, agencies within a jurisdiction which is not so general it lacks meaning is definitely worthwhile.[19]

Movement toward adoption of a law governing federal administrative agencies can be traced at least as far back as the early New Deal days when American Bar Association committees began issuing reports which viewed with alarm then current agency practices.[20] In 1937 came the report of the President's Committee on Administrative Management, a document recommending drastic alterations in the federal administrative process.[21] Upon presidential request, the Attorney General in 1939 appointed a committee to investigate the "need for procedural reform in the field of administrative law." Its detailed studies and report,[22]

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[16] *Cf.* Fuchs, *The Proposed New Code of Administrative Procedure,* 19 OHIO ST. L.J. 423, 431 (1958).

[17] During the 1940's some writers argued against "grossly horizontal" general administrative procedure laws. Cohen, *Legislative Injustice and the Supremacy "of Law"—An Appraisal of the Federal Administrative Procedure Act,* 26 NEB. L. REV. 323, 344 (1947); Beutel, *The Problem of Reform of Administrative Procedure,* 6 FED. B.J. 264 (1945).

The difficulties of drafting an over-all law, as well as its undesirability, were noted in BENJAMIN, *op. cit. supra* note 6, at 35-26. It also has been suggested that such efforts might not fulfill the aims of draftsmen. CARROW, THE BACKGROUND OF ADMINISTRATIVE LAW 4 (1948).

[18] Fuchs, *The Proposed New Code of Administrative Procedure,* 19 OHIO ST. L.J. 423, 424-25 (1958); Byse, *Administrative Procedure Reform in Pennsylvania,* 97 U. PA. L. REV. 22, 27-29 (1948). See also Schwartz, *Administrative Justice and Its Place In the Legal Order,* 30 N.Y.U.L. REV. 1390 (1955).

[19] Harris, *Administrative Practice and Procedure,* 6 OKLA. L. REV. 29, 31, 64 (1953).

[20] For discussion of these reports, see 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 1.04 (1958).

[21] PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES (1937).

[22] ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT (1941).

which was filed in 1941, still is a primary source of information about federal administrative procedure. During the Committee's investigation, the Walter-Logan Bill, sponsored by the American Bar Association, was passed by Congress. In vetoing it President Roosevelt stated that he desired to await the report and recommendations of the Attorney General's Committee before approving any general administrative procedure measure.[23] Intervention of the Second World War cut off efforts to proceed upon the Committee's recommendations until 1944. Finally a compromise was reached between interested parties, and in 1946 the Federal Administrative Procedure Act[24] was unanimously approved by both houses of Congress and signed by the President.[25] In spite of some tinkering, most of which has been wrought by elimination of agencies from the law's requirements,[26] this statute remains as the framework for federal administrative law.[27]

In the administrative procedure field federal cases and federal laws have a habit of later filtering down to the state level. Such has been the case with the notion of a general statute governing administrative procedure in the jurisdiction. Soon after the American Bar Association began poking about in the national arena, it fixed its attention also on state administrative procedure. In 1937 the administrative law section of the Association created a Committee on Administrative Agencies and Tribunals which proposed a uniform state statute. Its draft act was referred to the National Conference of Commissioners on Uniform State Laws which worked with the Committee in studying the measure. The proposed law was altered and revised after the Attorney General's Committee reported in 1941. Also, subsequent to the Benjamin Report of 1942, a prime source of information about state agency operations, it was once more re-worked. In 1943 it was decided to change the proposal to a model act, rather than a uniform one. The Conference

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[23] H. Doc. No. 986, 76th Cong., 3d Sess. 3-4 (1940).

[24] 60 Stat. 237 (1946), 5 U.S.C.A. §§ 1001-11 (1952). This law will hereinafter be cited as the Federal Act.

[25] For its legislative history, see *Administrative Procedure Act: Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 241 (1946).

[26] A striking instance of exemption of an agency followed the decision in Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), that the Federal Act § 5 covered deportation proceedings. Congress thereupon "reversed" the ruling. GELLHORN & BYSE, *op. cit. supra* note 5, at 1094.

[27] Substantial changes were urged by the Hoover Commission and its Task Force. For a discussion of their proposals, see Schwartz, *Summary of the Reports*, 30 N.Y. U.L. REV. 1270 (1955). The tendency of these suggestions to "judicialize" administrative procedure has been attacked in Fuchs, *The Proposed New Code of Administrative Procedure*, 19 OHIO ST. L.J. 423 (1958); Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U.L. REV. 1273 (1955).

finally approved the Model State Administrative Procedure Act in 1946.[28]

North Dakota was the first state to draw from the source of the Model Act in passing state general administrative procedure legislation. Its legislature acted in 1941—five years before the statute was approved by its sponsors.[29] Wisconsin, the first state to adopt the whole act, also passed its legislation in advance of final approval by the Commissioners.[30] Today nearly two-thirds of the states have followed the lead of North Dakota and Wisconsin by adopting some sort of general administrative procedure legislation.[31] Four of them in addition to Wisconsin —Maryland, Michigan, Missouri, and Oregon—are listed by the Commissioners as having adopted their Model Act.[32] However, according to Professor Kenneth Davis, by the beginning of 1959 only eleven states had passed comprehensive legislation on agency procedures.[33] Arizona was not among those jurisdictions listed.

In light of the information gained by states with these laws and the experience received through more than a decade of operating under the Federal Administrative Procedure Act, it was felt by the administrative law committee of the National Conference of Commissioners on

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[28] For the history of the Model Act, see HANDBOOK OF NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 197 (1946). For general discussions of the Model Act, see HEADY, ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES (1952); Schwartz, *The Model State Administrative Procedure Act—Analysis and Critique*, 7 RUTGERS L. REV. 431 (1953).

[29] Hoyt, *North Dakota Leads in Administrative Law Field*, 25 J. AM. JUD. SOC'Y 114 (1941).

[30] Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 WIS. L. REV. 214.

[31] For a list of states adopting various types of general administrative procedure acts, brought up to date to January of 1959, see DAVIS, ADMINISTRATIVE LAW CASES 572 (1959). After compilation of that list Washington adopted a general statute. Trautman & Peck, *The Administrative Procedures Act*, 34 WASH. L. REV. 281 (1959).

For discussions of state acts or proposed state legislation, see Trautman & Peck, *ibid.*; Curran & Sacks, *The Massachusetts Administrative Procedure Act*, 37 B.U.L. REV. 70 (1957); Terry, *The Proposed Texas Administrative Procedure Act*, 33 TEXAS L. REV. 499 (1955); Note, *A Comparative Study of Administrative Procedure in New Jersey and the Model State Administrative Procedure Act*, 7 RUTGERS L. REV. 465 (1953); Comment, *Federal and Missouri Administrative Procedure Acts: A Comparison*, 17 MO. L. REV. 286 (1952); Topper, *The Effect of the Ohio Administrative Procedure Act on Procedure Before the Board of Liquor Control*, 13 OHIO ST. L.J. 451 (1952); Schwartz, *An Administrative Procedure Act for New York*, 24 N.Y.U.L.Q. REV. 55 (1949); Sullivan, *Judicial Review in Illinois*, 1949, U. ILL. L.F. 304; Byse, *supra* note 18; Smith, *An Administrative Procedure Code for Kansas*, 16 KAN. B.J. 157 (1947); Merrill, *Calling Attention to a Proposal for Advance in State Administrative Procedure*, 17 OKLA. B.J. 1757 (1946).

Symposia discussing the Model Act may be found in 33 WASH. L. REV. 1 (1958); 44 CALIF. L. REV. 189 (1956); 33 IOWA L. REV. 193 (1948).

[32] 9C UNIFORM LAWS ANNO. 54 (Supp. 1959).

[33] DAVIS, ADMINISTRATIVE LAW CASES 572 (1959).

For results from a survey to indicate state interest in administrative procedure reform, see Administrative Law Section of American Bar Ass'n, Comm. on State Administrative Law, *State Administrative Law*, 4 ADMINISTRATIVE L. BULL. 131 (1952); and for a discussion of the interrelation of the Model Act with various comprehensive state acts, see Harris, *supra* note 19, at 29.

Uniform State Laws that a revision of the Model Act was in order. They so recommended to the Commissioners in 1957.[34]

The Model Act, in similitude of the federal statute, cleaves the bureaucratic universe into two worlds—rule-making and adjudication of contested cases.[35] This basic dichotomy is one of the few significant similarities between the two laws. The federal statute addresses itself mainly to procedures for agency quasi-judicial action. The "more primitive" Model Act concerns itself primarily with administrative rule-making and judicial review of adjudicatory decisions. Unlike federal administrative law before passage of the Federal Administrative Procedure Act, state norms concerning quasi-legislative activity and judicial review of contested agency case decisions were none too far advanced, and, consequently, more attention needed to be given to them.[36]

Arizona general administrative procedure legislation is based on the Model Act, with occasional helpings of the federal statute and numerous local notions written in. The Arizona bar association, acting through an administrative law committee, was instrumental in drafting and securing passage of the acts involved. The committee members determined that it would be sound strategy in dealing with the legislature to divide the Model Act into its three component parts and to urge their passage one at a time.[37] In 1952 the Arizona Administrative Procedure Act,[38] the part of the Model Act dealing with rule-making, was passed. This was followed in 1954 by adoption of the Arizona Administrative Act,[39] an enactment related to the Model Act's judicial review provisions. The adjudication portion of the Model Act was never adopted. This, at least in part, stemmed from the action of the National Conference in recommending a revision of the Model Act.[40]

There now have been sufficient interpretations of the Arizona provisions to warrant their study. In order to round out the Arizona administrative law picture, adjudication procedures from other jurisdictions should be noted by way of contrast with our lack of over-all statutory guideposts.

I. RULE-MAKING

Since the year of the Great Plague in the reign of King Charles II,

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[34] HANDBOOK OF NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 194 (1957).

[35] For discussions of this division, see Schwartz, *The Model State Administrative Procedure Act*, 33 WASH. L. REV. 1 (1958); Fuchs, *The Model Act's Division of Administrative Proceedings into Rule-Making and Contested Cases*, 33 IOWA L. REV. 210 (1948).

[36] Abel, *The Double Standard in Administrative Procedure Legislation: Model Act and Federal Act*, 33 IOWA L. REV. 228, 250-51 (1948).

[37] Interview With Charles H. Woods, March 19, 1960.

[38] ARIZ. REV. STAT. §§ 41-1001 to -1008 (1956).

[39] ARIZ. REV. STAT. §§ 12-901 to -914 (1956).

[40] Interview With Charles H. Woods, March 19, 1960.

England has had the twice-weekly London Gazette as an instrument of official publicity.[41] Publication of all new regulations in the Gazette was specifically required by the Rules Publication Act in 1893.[42] The English system was adopted for agencies of the United States government by the Federal Register Act of 1935.[43] This long-overdue statute came at a time when lack of facilities for central filing and publication of federal administrative materials had made it difficult, and ofttimes impossible, for both private parties and government officials to inform themselves about administrative quasi-legislation.[44] During the argument of *Panama Refining Co. v. Ryan*,[45] counsel for the government was obliged to admit that a portion of the regulations upon which the government's case rested had been inadvertently, but technically, revoked. The withering questioning of counsel from the bench[46] and the critical comment in the opinion concerning the failure to give public notice of the change in the rule[47] lent weight to prior calls to action[48] and lead directly to adoption of the Federal Register system.

Prior to 1952 in Arizona there was no single source for information about agency rules, there existed no uniform method of giving notice of their adoption, and the substance of many regulations was unknown. Such was the pressing character of the need that the first portion of the Model Act proposed for adoption here was the rule-making part.[49]

Coverage.—The Arizona Administrative Procedure Act, in spite of the all-inclusive ring of its title, is applicable to rule-making only. Definition of the terms "rule" and "contested case" is identical to the Model Act and, consequently, adopts the implicit dichotomy of that law.[50] What is administrative legislation cannot be agency adjudication and vice versa. The definition of "rule" establishes two tests by which official action might be categorized — "general application" and "future effect." Unlike the federal act, which requires only that action be of

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[41] CARR, ENGLISH ADMINISTRATIVE LAW 57 (1941).
[42] Rules Publication Act, 1893, 56 & 57 Vict., c. 66.
[43] 49 Stat. 500 (1935), 44 U.S.C.A. §§ 301-14 (Supp. 1959).
[44] For discussions of the background of the Federal Register, see 1 C.F.R. xxii (1949); GELLHORN & BYSE, *op. cit. supra* note 5, at 90; Futor, *Searching the Federal Regulations: Forty-Seven Steps Are Too Many*, 45 A.B.A.J. 43, 44-45 (1959).
[45] 293 U.S. 388 (1935).
[46] For an account of the questioning of counsel, see United States v. Pub. Util. Comm'n, 345 U.S. 295, 320 (1953) (concurring opinion).
[47] Panama Refining Co. v. Ryan, 293 U.S. 388, 412 (1935).
[48] Two earlier articles urging adoption of a central publication system were: Griswold, *Government in Ignorance of Law: A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934); Fairlie, *Administrative Legislation*, 18 MICH. L. REV. 181 (1920).
[49] Interview with Charles H. Woods, March 19, 1960.
[50] See authorities cited note 35 *supra*. These definitions are found in ARIZ. REV. STAT. § 41-1001 (1956), and MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1 (1944). The latter will hereinafter be cited as the Model Act.

"future effect" and permits it to be of either general or particular application,[51] the Arizona law requires both generality of application and futurity of effect. This encompasses most, but not all, instances usually considered as rule-making.[52]

The term "agency," as used in the Arizona act, excludes organizations within the legislative and judicial branches of the state government;[53] it includes all executive agencies exercising administrative power, irrespective of the title given to such agencies.[54] Although it is not specifically so stated in the definitions section of the act, it is obvious upon examination of the statute as a whole that neither county nor municipal agencies are covered.[55] This wide gap in the law is shared by almost every other jurisdiction in the nation.[56]

Rule-making procedure.—The draftsmen of the federal and model laws resisted the temptation to "judicialize" the procedure required of officials for promulgation of rules. Instead of a formal trial-type hearing they provided for a notice style of procedure. Interested persons are given advance notice by publication of the proposed adoption of rules and have the right to present their views; they are not entitled to a full-dress plenary hearing.[57] Under the Arizona law they may present statements, arguments, and contentions in writing; the agency has the option to determine whether they can also present oral arguments.[58]

Contents of the notice as required by the Model Act are somewhat limited,[59] so the draftsmen of the Arizona statute borrowed from the more extensive list in the Federal Administrative Procedure Act.[60] Notice must include a statement of the time, place, and nature of the rule-making proceedings, reference to the authority for promulgation of the regulation, a summary or the express terms of the rule, and whatever else the specific statute governing the agency requires.[61] Notice may be

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[51] Federal Act § 2(c) provides: " 'Rule' means the whole or any part of any agency statement of general or *particular* applicability and future effect . . . ." (Emphasis added.)

[52] Schwartz, *The Model State Administrative Procedure Act— Analysis and Critique*, 7 RUTGERS L. REV. 431, 443 (1953).

[53] ARIZ. REV. STAT. § 41-1001(1) (1956).

[54] *Ibid.*

[55] Section three of the statute uses the terminology "state agency." ARIZ. REV. STAT. §41-1003 (1956).

[56] "Nearly all state legislation fails to reach local governmental action." DAVIS, ADMINISTRATIVE LAW CASES 572 (1959).

[57] Federal Act § 4; Model Act § 2(3). For a discussion of rule-making procedures under the national law, see Reich, *Rule Making Under the Administrative Procedure Act*, in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 492 (1947). A similar discussion of the Model Act provisions may be found in HEADY, *op. cit. supra* note 28, at 26-65.

[58] ARIZ. REV. STAT. § 41-1002(B) (1956).

[59] Model Act § 2(3).

[60] *Compare* ARIZ. REV. STAT. § 41-1002(A) (1956), *with* Federal Act § 4(a).

[61] ARIZ. REV. STAT. § 41-1002(A) (1956).

dispensed with in case of a bona fide emergency.[62]

Publication of rules.—Under Arizona law, as a condition precedent to their effectiveness, all regulations covered by the terms of the Administrative Procedure Act must be properly certified and filed with the Secretary of State.[63] He, in turn, must cause them to be published.[64] This, it was felt, would fulfill the crying need for making quasi-legislative materials available to the public and to state officials.

Until recently enforcement of the penalty of invalidity of improperly filed regulations was lax, and the legislation lost a great deal of its potential.[65] But in *State v. Wacker*[66] the Arizona court made it plain that agencies must adhere to the publication requirement. In that case an amendment to bollworm regulations was not given effect by the court because, although it was filed, it had not been certified as required by two provisions of the statute.[67] Invalidation for mere lack of certification clearly indicates that the court will not enforce any regulation which has not even been filed.

Agencies will, of course, be bound by their own regulations,[68] particularly when they have been properly certified and filed.[69] So too will private citizens. *Federal Crop Ins. Corp. v. Merrill*[70] held that a farmer who was unaware of the contents of federal crop insurance regulations printed in the Federal Register was nonetheless bound by them. This reverse side of the coin can work hardships upon those unwilling to follow with religious zeal the printed changes in the rules. Mr. Justice Jackson noted the absurdity of holding the farmer to know what the Federal Register contains; if he tried to keep up his reading of that journal of regulations, "he would never need crop insurance, for he would never get time to plant crops."[71]

Publication is not the entire answer to the notice problem. Anyone who has ever tried to do research in the Federal Register and the accompanying Code of Federal Regulations soon learns that this is a time consuming process which can be largely self-defeating.[72] These federal

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[62] ARIZ. REV. STAT. 41-1003 (1956).
[63] ARIZ. REV. STAT. § 41-1004, -1005 (1956).
[64] ARIZ. REV. STAT. § 41-1006 (1956).
[65] 1 ARIZ. L. REV. 329, 330 (1959).
[66] 86 Ariz. 247, 344 P.2d 1004, 1 ARIZ. L. REV. 329 (1959).
[67] ARIZ. REV. STAT. §§ 41-1004(A), -1005 (1956).
[68] See, *e.g.*, George v. Ariz. Corp. Comm'n, 83 Ariz. 387, 322 P.2d 369 (1958); Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc., 77 Ariz. 323, 271 P.2d 477 (1954); Civil Service Bd. v. Warren, 74 Ariz. 88, 244 P.2d 1157 (1952); Guy F. Atkinson Co. v. Kinsey, 61 Ariz. 127, 144 P.2d 547 (1944); Taylor v. McSwain, 54 Ariz. 295, 95 P.2d 415 (1939); City of Phoenix v. Sittenfeld, 53 Ariz. 240, 88 P.2d 83 (1939); Welch v. State Bd. of Social Security & Welfare, 53 Ariz. 167, 87 P.2d 109 (1939).
[69] Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc., *supra* note 68.
[70] 322 U.S. 380 (1947).
[71] *Id.* at 387 (dissenting opinion).
[72] Futor, *supra* note 44, catalogues the steps needed to find the most recent version of a regulation.

publications have been characterized as "cumbersome" and "hardly adequate to meet the real needs of citizens and lawyers."[73] The indices are of very limited value; the materials are not promptly printed; and revisions of regulations have often ruined the usefulness of the whole system. In fact it has been maintaned that:

> Slowly we begin to understand. The Federal Register is not supposed to be read at all. It simply prints things so that someday, somewhere, some government official can say—"Yes, but it says in the Federal Register. . . ." All this government stuff, in other words, is not reading matter, but prefabricated parts of quarrels.[74]

The Arizona law requires the secretary of state periodically (at least once every two years) to compile the rules filed with his office.[75] Even though copies of the rules are available to the public at cost,[76] all of the drawbacks of the federal system are now present. They are mitigated only by the fact that there are fewer rules in Arizona. Legislation to adopt a loose-leaf system, like that of the CCH and Prentice-Hall reporters, would go a long way toward improving the present method of publication.[77]

Judicial review of rule-making.—Section seven of the Arizona Administrative Procedure Act permits those persons affected by a rule to seek declaratory judgment in the Superior Court of Maricopa County.[78] This remedy was invoked in *State Tax Comm'n v. Wallapai Brick & Clay Prod., Inc.*[79] The impact of the procedure act was demonstrated by the court's refusal to follow *Smotkin v. Peterson*,[80] an earlier case in which the tax commission was denied the use of declaratory judgment to determine whether license fees should be paid. In the *Wallapai* case the court noted that, since the plaintiff challenged rules adopted in pursuance of the Administrative Procedure Act, and inasmuch as the action complied with the Declaratory Judgments Act,[81] the lower court properly refused to dismiss the complaint.[82] With the adoption of the Administrative Procedure Act the legislature granted this additional remedy for judicial review of administrative regulations.

The apparently broad grant of standing to sue to "any person who is or may be affected by a rule"[83] perhaps can be limited by reading

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[73] GELLHORN & BYSE, ADMINISTRATIVE LAW 92 (1954).
[74] FLESCH, THE ART OF PLAIN TALK 165 (1946).
[75] ARIZ. REV. STAT. § 41-1006 (1956).
[76] *Ibid.*
[77] Such a system is advocated by Futor, *supra* note 44.
[78] ARIZ. REV. STAT. § 41-1007 (1956).
[79] 85 Ariz. 23, 330 P.2d 988 (1958).
[80] 73 Ariz. 1, 236 P.2d 743 (1951).
[81] ARIZ. REV. STAT. §§ 12-1831 to -1846 (1956).
[82] State Tax Comm'n v. Wallapai Brick & Clay Prod., Inc., 85 Ariz. 23, 29, 330 P.2d 988, 992 (1958).
[83] ARIZ. REV. STAT. § 41-1007(A) (1956).

in to it pre-existing standing requirements,[84] or, at least, the standing to sue prerequisites for utilization of declaratory judgment procedures.[85]

II. ADJUDICATION

The Federal Administrative Procedure Act is just that—a statute governing the procedure followed by national agencies. While it covers rule-making procedure,[86] its main subject is procedure for agency adjudication. It contains an extensive series of requirements that must be met in instances of administrative judicial-type proceedings.[87] The Model Act is not oriented toward the problem of procedure for contested cases. Nevertheless it does have some provisions relating to that area.[88] Neither the Arizona Administrative Procedure Act nor the Arizona Administrative Review Act purport to deal with agency adjudication. The most important area of administrative law has thus been left to the tender mercies of the statutes creating the agencies—laws which, for the most part, are singularly free of any informative procedural details—and to generalized constitutional precepts.[89] While court rulings have supplied many of the missing protections, the very nature of the judicial process dictates that they will not cover all of the areas of procedural problems.[90] Furthermore, there is no restatement or codification of the judge-made rules.

Within a jurisdiction effort must be made to avoid not only the Scylla of no restatement of norms governing agency procedure but also the Charybdis of a rigid procedural code "judicializing" administrative processes or over-standardizing them. Court procedure forms a pattern which frequently is applicable to administrative action; but the differences between the administrative and judicial processes dictate that court procedures not be adhered to slavishly.[91] Furthermore, creators of a true administrative procedure act must beware of the tendency to make legislation so general as to be meaningless, or, at the other extreme, so concrete as to force dissimilar agencies into the same Procrustean mold.[92]

The Federal Administrative Procedure Act, while it is far from

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[84] For a discussion of the law of standing to sue, see text accompanying notes 121-26 *infra*.

[85] *Cf.* ARIZ. REV. STAT. §§ 12-1832 to -1836 (1956).

[86] See text accompanying note 57 *supra*.

[87] Federal Act §§ 5-8, 11.

[88] Model Act §§ 8-11.

[89] Due process provisions are frequently used to control adjudicatory procedure. U.S. CONST. amend XIV, § 1; ARIZ. CONST. art. 2, § 4.

[90] Lack of judicial power to initiate cases means that, unless some private individual or agency brings an issue before a court in a proceeding for judicial review, the judges will never be able to pass on it.

[91] Dixon, *Administrative Practice and Procedure and the Proposed Administrative Practice Act*, 19 FED. B.J. 200 (1959).

[92] 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 802 (1958). See also text accompanying notes 17-19 *supra*.

perfect,[93] provides at least a listing of problems which must be addressed in any satisfactory, complete administrative procedure act. A listing of some of the areas encompassed by that law—areas not dealt with by any Arizona general legislation—will indicate the extent to which this state is not served by adequate statutory guideposts to fair and efficient administrative procedure. Some such areas are:

1. Distinction between instances in which full hearings are requisite and those in which they are not.[94]

2. Timely and complete notice of hearing in contested cases.[95]

3. Full participation by parties to such contests[96]—in person, by counsel,[97] or both.

4. Separation within the agency of decision-making officials from administrative prosecutors.[98]

5. Determination as to what matters might be received into evidence or otherwise considered by persons hearing the case.[99]

6. Extent to which those deciding the case may rely upon information not contained in the record.[100]

7. Need to build up a formal record.[101]

8. Extent to which agency heads can delegate hearing and deciding functions.[102]

9. Weight to be attached to rulings of agency trial examiners or others to whom conduct of hearings is delegated.[103]

10. Bias, prejudice, or built-in point of view of those hearing and deciding cases.[104]

A similar, but less lengthy, list can be compiled concerning provisions of the Model State Administrative Procedure Act.[105]

It is to be hoped that the Arizona legislature will, on its own motion, or with the encouragement of the state bar association, give its

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[93] See note 27 *supra*.
[94] Federal Act § 5.
[95] Federal Act § 5(a).
[96] Federal Act § 5(b).
[97] Federal Act § 6(a).
[98] Federal Act § 5(c). This is the key provision of the federal law.
[99] Federal Act § 7(c).
[100] *Ibid.*
[101] Federal Act § 7(d). Two recent Arizona cases relating to this problem are: Dallas v. Ariz. Corp. Comm'n, 86 Ariz. 345, 346 P.2d 152 (1959); Walker v. De Concini, 86 Ariz. 143, 341 P.2d 933 (1959).
[102] Federal Act §§ 7(a), 8(a). See also Walker v. De Concini, *supra* note 101.
[103] The federal statute increased the importance of the trial examiner's decisions. Federal Act § 8(a). See also Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951).
[104] For a discussion of the law of bias, see FORKOSCH, ADMINISTRATIVE LAW § 215 (1956).
[105] Examine Model Act §§ 8-11. These provision are interpreted in Schwartz, *The Model State Administrative Procedure Act—Analysis and Critique*, 7 RUTGERS L. REV. 431, 448-55 (1953).

attention to an intelligent study[106] leading towards eventual solution of these issues. The rapidly growing population and industrialization of the state point to an ever increasing case load for state agencies. The time has long since passed, and is ever receding farther into the past, when the procedure followed by the state bureaucracy in contested cases can be left to *ad hoc* correction.

III. JUDICIAL REVIEW

Judicial review of agency adjudication acts chiefly to curb excess of power, not to compel its exercises; judges are called upon to veto agency decisions, not to initiate judicial ones. Other limitations also narrow the effectiveness of review.

> First is the great volume of administrative adjudications . . . Then there are financial obstacles: The amounts involved may be too small or the parties too poor to meet the costs of court litigation. . . . In many cases "business transactions cannot wait upon the exigencies of appeal . . . . Time is of the essence." Or the business cannot afford to divert to litigation the energies of its executives. In some other cases the harm to be caused by administrative action is done before the stage for judicial review is set and cannot be undone by the review.[107]

Review nevertheless performs the important function of curbing bureaucrats when they exceed their delegated authority or act contrary to state or federal constitutional provisions. Its very existence will cause "overzealous officials to . . . think once, at any rate, even if not twice, before they act."[108] The judiciary in performing this function is the authoritative interpreter of constitutional and statutory provisions—although as to the latter the judges will in some instances defer somewhat to the agency construction. Judicial review can insist that administrative determinations of fact be supported by substantial evidence. Thus it can give relief from clearly "unreasonable" or "arbitrary" administrative actions; it can require agency officials to follow minimum standards of procedural fairness.

Formerly review of agency action was a burning issue. It was once widely felt that courts—particularly federal district courts—had abdicated their powers of review. The provisions of section ten of the Federal Administrative Procedure Act were designed to increase judicial participation in the administrative process.[109] The review problem was

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[106] Such a study might be along the lines of the New York one. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942).

[107] ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 76-77 (1941).

[108] HORSKY, THE WASHINGTON LAWYER 78 (1952).

[109] Federal Act § 10, Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951).

considered important enough in Arizona to warrant special legislation.[110] In 1954 the Arizona Administrative Review Act,[111] a statute drawing from the judicial review sections of the Model Act,[112] was adopted.

Coverage.—The state review act, like the rule-making procedure act, adopts the dichotomy between adjudication and rule-making.[113] It is applicable to case decisions only, not to rule-making. It specifically excludes political subdivisions, municipal corporations, or agencies thereof.[114] Determinations of the department of public welfare are also outside its scope.[115]

The most important exclusion from coverage of the judicial review statute is "where the act creating or conferring power on any agency or a separate act provides for judicial review of the agency decisions and prescribes a definite procedure for the review."[116] Recently this provision was interpreted in *Knape v. Brown*,[117] a case in which a disappointed applicant for a beauty shop license sought to use the Administrative Review Act as a basis for judicial review. To her argument that the act complemented the review provisions of the cosmetology license law,[118] the court replied that the special act controlled the general review statute; and it added that the express provisions of the review act forbade its use when a statute provided definite procedure for review of agency case decisions.[119] Thus these review provisions are complementary to prerogative writs and equitable remedies (when those methods of review are not specifically made applicable to an agency's decisions); they are not an alternative remedy in instances of statutory review. This narrows the potential applicability of the statute, but seems to accord with the intent of the draftsmen.[120]

Standing to sue.—Whenever a disappointed administrative litigant seeks judicial reconsideration of agency action he must determine whether he is a person who can go to court for review, when can he seek judicial aid, how he should proceed, and how much help a judge can give him. The first question is one of standing to sue; it is followed by questions as to timing (exhaustion of administrative remedies, ad-

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110 Interview With Charles H. Woods, March 19, 1960.
111 ARIZ. REV. STAT. §§ 12-901 to -914 (1956).
112 Model Act §§ 12, 13.
113 ARIZ. REV. STAT. § 12-901(2) (1956).
114 ARIZ. REV. STAT. § 12-901(1) (1956).
115 ARIZ. REV. STAT. § 12-902(A) (1956).
116 *Ibid.*
117 86 Ariz. 158, 342 P.2d 195 (1959).
118 ARIZ. REV. STAT. § 32-554 (1956). This provision was replaced by Ariz. Sess. Laws 1958, ch. 101, § 2, which adopted the Administrative Review Act as the applicable means of judicial review. ARIZ. REV. STAT. § 32-554 (Supp. 1959).
119 Knape v. Brown, 86 Ariz. 158, 161, 342 P.2d 195, 197 (1959). See also State *ex. rel.* Morrison v. Thomas, 80 Ariz. 327, 289 P.2d 624 (1956).
120 Interview with Charles H. Woods, March 19, 1960.

ministrative rehearings, and statute of limitations problems), methods for review, and scope of review.

The question of standing to sue arises when an individual, situated some distance from an administrative explosion, believes himself hurt. Those who were parties to the case before the agency are usually not too hard pressed to show an interest of theirs has been invaded by a decision.[121] Collateral or more remotely interested persons, though, often find the judicial doors barred to them. Can competitors of licensees protest in court administrative issuance of licenses? Can taxpayers challenge public expenditure or perhaps even non-fiscal official decisions? Can public officers go to court to represent the interest of the state? By-and-large Arizona has adopted a fairly liberal attitude with regard to standing to sue. Southern Pacific was permitted to appeal to the courts from a Corporation Commission grant of a certificate of public convenience and necessity to a competitor, a truck line paralleling its tracks.[122] In the leading case of *Ethington v. Wright*[123] taxpayers were allowed to attack in court a statute delegating powers to the Corporation Commission. The theory of the *Ethington* case was that they had suffered an injury by the appropriation made to administer the act. This certainly was a very hypothetical injury. In substance taxpayers were allowed to challenge a non-fiscal action. The Attorney General was held to possess standing to seek further judicial review in a case in which the administrative official was reversed by the superior court but elected to go no further up the judicial hierarchy.[124] This was done on the ground that the state was beneficially interested. In reply to the suggestion that the Attorney General should have intervened at the trial court level, the court noted that there was then no reason to do so since the administrative official was then representing the interests of the state.

To this liberal position taken by the courts the Administrative Review Act adds little. In section 2(B), which deals with the scope of the act, there is specific reference to "the parties to the proceeding before the administrative agency," but the provision relates to their being barred for failure to seek review within the time and manner provided by the act.[125] Nothing else in the law could be interpreted as narrowing the pre-existing standing position. Review is available upon

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[121] 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 22.18 (1958), takes a dim view of the federal narrowness and technicality in regard to standing to sue, and lauds the more open state view.

[122] Corp. Comm'n v. So. Pac. Co., 67 Ariz. 87, 191 P.2d 719 (1948).

[123] 66 Ariz. 382, 189 P.2d 209 (1948).

[124] State *ex rel.* Morrison v. Thomas, 80 Ariz. 327, 289 P.2d 624 (1956).

[125] ARIZ. REV. STAT. § 12-902(B) (1956).

the petition of any person adversely affected.[126]

Timing of review.—Related to the problem of standing to sue is that of timing of judicial review suits. The questions are: when will judicial doors be opened for review, and when will they be closed. The language of the Arizona review act provisions concerning coverage,[127] commencement of an action,[128] and court jurisdiction and venue in review cases[129] refers to "final administrative decisions," and, thus, helps mark the earliest point in time when administrative action is reviewable. Definition of the term "final" is partially provided by specific exclusion from review of administrative cases still subject to agency rehearing or administrative review.[130] It is not otherwise elaborated.

The Supreme Court of the United States in the prominent case of *Myers v. Bethlehem Shipbuilding Corp.* refused to entertain a claim, made in advance of an impending labor board hearing, that the agency lacked jurisdiction over the complainant; it relied upon

> the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.[131]

This language was quoted with full approval and applied by the Arizona court in the *Marchese* case.[132] It would appear then that in Arizona administrative action is not "final" until agency remedies are exhausted.

Exceptions to the exhaustion rule have been carved out by many state courts[133] and even in some instances by the federal courts.[134] The Arizona supreme court has held it inapplicable when an administrator has sent a litigant to court in advance of exhaustion of his remedies.[135] Justice Udall has noted at least two exceptions to the rule: (1) where

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[126] The federal law was thought by Congress to give a similar right. S Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946). Nevertheless the courts have interpreted it narrowly. See authority cited at note 121 *supra.*

[127] ARIZ. REV. STAT. § 12-902(A) (1956).

[128] ARIZ. REV. STAT. § 12-904 (1956).

[129] ARIZ. REV. STAT. § 12-905 (1956).

[130] ARIZ. REV. STAT. § 12-901(2) (1956).
The statute also provides that, if under the terms of the law creating an agency a decision has become final because of failure to "petition for hearing or application for administrative review within the time allowed by law, the decision shall not be subject to judicial review under . . . [it], except for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter." ARIZ. REV. STAT. § 12-902(B) (1956). See also City of Tucson v. Simpson, 84 Ariz. 39, 323 P.2d 689 (1958).

[131] 303 U.S. 41, 50-51 (1938).

[132] United Ass'n of Journeymen & Apprentices of the Plumbing Indus., Local 469 v. Marchese, 81 Ariz. 162, 168-69, 302 P.2d 930, 934-35 (1956). See also Williams v. Bankers Nat'l Ins. Co., 80 Ariz. 294, 297 P.2d 344 (1956).

[133] See, *e.g.*, Nolan v. Fitzpatrick, 9 N.J. 477, 89 A.2d 13 (1952).

[134] See, *e.g.*, Adkins v. School Bd., 148 F. Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957).

[135] Clark v. Tinnin, 84 Ariz. 259, 304 P.2d 947 (1956).

the question in dispute is purely a legal one, and (2) where the administrative remedy would be fruitless.[136] It remains to be seen how these and other exceptions to the exhaustion doctrine will fare under the Arizona Administrative Review Act.

When will the courts close their once open doors upon a seeker of judicial review? Obviously someone who has failed to file an appeal within that time prescribed by the state governing the proceeding is barred from court. As to proceedings under the review act it is provided that:

> An action to review a final administrative decision shall be commenced by filing a complaint within thirty-five days from the date when a copy of the decision sought to be reviewed is served upon the party affected.[137]

Any later is too late, and the opportunty for court consideration of the case is gone.

Method of review.—Some statutes creating state administrative agencies outline a specified route which must be taken by those seeking judicial review of their decisions. Thus, certain Corporation Commission orders are reviewed by taking a statutory "appeal" to the superior court;[138] the writ of mandamus provides the review method for reaching the supreme court in certain Industrial Commission cases;[139] certiorari is the statutory means used to review occupational disease disability decisions.[140] Also the Administrative Review Act might be specified by a statute as the proper method.[141] In cases where the applicable statute prescribes a definite procedure counsel must utilize such means; use of other devices usually will prove fruitless.[142]

Frequently, though, the legislature fails to dictate the method by which review must be sought. It might, for example, merely provide that an agency decision ". . . may be reviewed by a court of competent jurisdiction . . ."[143] and not explain how to approach such a court. In such event, prior to adoption of the Arizona Administrative Review Act, it was clear that some equitable remedy or some prerogative writ

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136 Williams v. Bankers Nat'l Ins. Co., 80 Ariz. 294, 304, 297 P.2d 344, 351 (1956).
137 ARIZ. REV. STAT. § 12-904 (1956).
138 ARIZ. REV. STAT. § 40-254 (1956).
139 ARIZ. REV. STAT. § 23-948 (1956).
140 ARIZ. REV. STAT. § 23-1146(A) (1956).
141 ARIZ. REV. STAT. § 32-554 (Supp. 1959).
142 Thus, use of the general administrative review law was not allowed in Knape v. Brown, 86 Ariz. 158, 342 P.2d 195 (1959); State *ex rel.* Morrison v. Thomas, 80 Ariz. 338, 297 P.2d 631 (1956); State *ex rel.* Morrison v. Garrett, 80 Ariz. 337, 297 P.2d 631 (1956); State *ex rel.* Morrison v. Thomas, 80 Ariz. 327, 297 P.2d 624 (1956).
143 ARIZ. REV. STAT. § 3-422 (1956).

should have been employed.[144] It was uncertain, though, as to which remedy was available, which writ would lie, or whether several alternates were open. It has been asserted that:

> For the purpose of creating treacherous precedural snares and preventing or delaying the decision of cases on their merits, . . . a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing, the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.[145]

Arizona, like other states,[146] has an extraordinary remedy system which is subject to at least some of these criticisms.[147]

Abolition of multiple methods of procedure is the solution to this problem just as burial of the forms of action wrought judicial procedural reform. "Establish a single, simple form of proceeding for all review of administrative action. Call it 'petition for review'."[148] This was accomplished neither by the Federal Administrative Procedure Act, which expressly recognized all prior applicable forms of review,[149] nor in the Model Act, which established different systems for review of case decisions and of rule-making.[150]

Similarly the Arizona act does not cure plurality of remedies. In the *Bauer* case the state supreme court sought to protect the statute from invasion by refusing to uphold issuance of a writ of mandamus when the review act could have been utilized.[151] Last year, however, the court permitted access to extraordinary remedies in at least one case in which the general administrative review statute would seem to

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[144] The two most frequently used writs are mandamus, ARIZ. REV. STAT. §§ 12-2021 to -2029 (1956), and certiorari, ARIZ. REV. STAT. §§ 12-2001 to -2007 (1956). Less frequently employed are prohibition, ARIZ. CONST. art. 6, § 4, habeus corpus, ARIZ. REV. STAT. §§ 13-2001 to -2027 (1956), and quo warranto, ARIZ. REV. STAT. §§ 12-2041 to -2045 (1956).

[145] 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 24.01 (1958).

[146] See, *e.g.*, R. J. Davis, *Mandamus to Review Administrative Actions in Arkansas*, 11 ARK. L. REV. 351 (1957); R. J. Davis, *Mandamus to Review Administrative Action in West Virginia*, 60 W. VA. L. REV. 1 (1957).

[147] For example, there is the question of what constitutes an adequate remedy at law. See McCarrell v. Lane, 76 Ariz. 67, 258 P.2d 988 (1953).

[148] 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 24.01 (1958).

[149] Federal Act § 10(b).

[150] Model Act §§ 12(2), 6.

[151] State Bd. of Technical Registration v. Bauer, 84 Ariz. 237, 326 P.2d 358 (1958). This case also dealt with the problem of finality.

have been available;[152] and previously it denied that "this statutory procedure for review is, *in all cases,* the *exclusive* and an *adequate remedy* for . . . a person aggrieved . . . ."[153] The determination was rested upon whether the review act could furnish a plain, speedy, and adequate remedy. If it cannot, the extraordinary remedies are still available.

Scope of review.—Some statutes delegating adjudicatory power to state administrative agencies make express provision for the scope of review courts should employ in considering agency decisions. This might constitute anything from very limited judicial interference, such as that in the agricultural prorate statute which confines review to "the sufficiency of the evidence introduced before the commissioner,"[154] to a de novo judicial proceeding, such as that found in liquor licensing.[155] It should be borne in mind, though, that even laws purporting to permit little or no review have been neatly evaded by the courts,[156] and that in de novo review cases the court may give weight to administrative determinations.[157] Nevertheless in considering any case the power-granting statute should first be examined to see if it contains some guide as to the scope of review.

According to a recent interpretation of the Administrative Review Act, review of cases governed by it may be accomplished in three ways:

> (1) upon the "entire record before the court"; (2) with additional or new evidence in support of or in opposition to a finding, order, determination or decision of the administrative agency, in cases where in the discretion of the court justice demands the admission of such evidence; or (3) upon a trial de novo with or without a jury, if demanded in the complaint or answer of a defendant other than the agency and if no hearing was held by the agency or the proceedings were not stenographically reported so that a transcript might be made.[158]

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[152] Anthony A. Bianco, Inc. v. Hess, 86 Ariz. 14, 339 P.2d 1038 (1959). The statute involved, ARIZ. REV. STAT. § 3-422 (1956), was similar to the statute, ARIZ. REV. STAT. § 3-495 (1956), in Foote v. Gerber, 85 Ariz. 366, 339 P.2d 727 (1959). In that case the review act was used.

[153] State Bd. of Technical Registration v. McDaniel, 84 Ariz. 223, 326, P.2d 348 (1958).

[154] ARIZ. REV. STAT. § 3-433 (1956), Anthony A. Bianco, Inc. v. Hess, 86 Ariz. 14, 339 P.2d 1038 (1959).

[155] See, *e.g.*, Lane v. Ferguson, 62 Ariz. 184, 156 P.2d 236 (1945); Duncan v. Mack, 59 Ariz. 36, 122 P.2d 215 (1942).

For other areas in which de novo review is sometimes employed, see Montierth v. State Land Dep't, 84 Ariz. 100, 324 P.2d 228 (1958); Corp. Comm'n v. So. Pac. Co., 55 Ariz. 173, 99 P.2d 702 (1940).

[156] See, *e.g.*, Dick v. Cahoon, 84 Ariz. 199, 325 P.2d 835 (1958).

[157] See, *e.g.*, Welker v. Stevens, 82 Ariz. 233, 311 P.2d 832 (1957); Chee Lee v. Superior Court, 81 Ariz. 142, 302 P.2d 529 (1956).

[158] Foote v. Gerber, 85 Ariz. 366, 372, 339 P.2d 727, 730 (1959). This case interprets ARIZ. REV. STAT. § 12-910 (1956).

This does not, however, indicate the weight a court should give to the determinations which were made by the administrative body. It merely relates to when a judge can seek further information than that given in the record.

Traditionally the extent to which courts will examine decisions of bureaucrats for alleged errors depends upon the sort of supposedly erroneous determinations made. Findings of fact will not be disturbed if they are based upon "substantial evidence upon the whole record."[159] Conclusions of law, on the other hand, may be more closely scrutinized by the judges; the courts will approve of them only if they are considered to be correct.[160] Neither the federal act[161] nor the Model Act[162] explain how to determine the difference between a finding of fact and a conclusion of law. Likewise the Arizona statute relies upon the distinction, but does not explain how it is drawn.[163]

CONCLUSIONS

From the foregoing it appears that, while Arizona has made a beginning toward a general administrative procedure act on the state level, it has as yet no adequate over-all statute. Besides ignoring county and city administrative activities, the Arizona laws omit adjudicatory procedure entirely and deal with judicial review and rule-making only superficially.

The state legislature would be well-advized to cause a study to be made of state and local agency operations. On such a basis proper legislation could be drafted to "enable the government to control the governed; and . . . [to] oblige it to control itself."

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[159] For some Arizona cases using this rule, see Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 294 P.2d 378 (1956); Mountain States Tel. & Tel. Co. v. Sakrison, 71 Ariz. 219, 225 P.2d 707 (1950); Waite v. Industrial Comm'n, 68 Ariz. 299, 205 P.2d 579 (1949). *But cf.* O'Neill v. Martori, 69 Ariz. 270, 212 P.2d 994 (1949).

For an excellent general discussion of the scope of review of questions of fact, see Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020 (1956).

[160] See Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955).

[161] Federal Act § 10(e).

[162] Model Act § 12(7).

[163] The Arizona statute does not specifically mention this distinction in either the scope of review provision, ARIZ. REV. STAT. § 12-910 (1956), or the section giving power to the trial court, ARIZ. REV. STAT. § 12-911 (1956). It does, however, draw a line between the two types of determinations in the pleadings provision, ARIZ. REV. STAT. § 12-909(A) (1956), and was drafted following the Model Act provisions which do use the distinction.

THE ARIZONA BAR-
FROM INDIVIDUALISM TO INTEGRATION

JAMES M. MURPHY*

On the Glorious Feast of St. Patrick in the year 1933, the State Bar of Arizona was created as an integrated legal entity.[1] By act of the legislature the State Bar became a semi-public body, and membership in it was required for anyone who might practice law in Arizona.

Integration did not come easily and was finally passed by a very suspicious and rather reluctant legislature. The legislators felt that since the lawyers wanted this particular bill there must be something wrong with it, so it took several sessions before the actual act was finally passed and signed into law by the Governor. So difficult had it been to secure the bill's passage that, once passed by the legislature, rumor has it that Judge Dudley W. Windes immediately took the bill, moved into the Governor's office, and threatened to remain there until it was signed by the Governor. In any event, the bill was signed and the State Bar began its career as an integrated bar.

Seemingly, Arizona has always been well in the vanguard of social and economic legislation, and so it was not too unusual to find that once again Arizona was one of the states which took the lead in creating this progressive type organization.

While lawyers had been practicing in Arizona Territory since 1865 and several bar associations had been organized from time to time, it was not until 1933 that the culmination was seen in the legislation which is now part and parcel of our daily legal life.

The year 1895 seems to be the first year that a statewide organization was attempted—known as the Bar Association of Arizona. The earliest record of a state meeting is a delightful menu of the banquet held by the Bar Association of Arizona at the Opera House Cafe in

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* See Contributors' Section, p. 86, for biographical data.

[1] The word "integration" is defined as: "Act or process of making whole or entire." MERRIAM WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1957).

> The voluntary state bar organizations in existence proved to be impotent to carry on the high purposes and noble aspirations of the legal profession for the simple reason that they were composed only of a small minority of those eligible to its membership. This weakness was readily apparent to the leaders in the legal profession and a program was initiated shortly after the turn of the century to secure the adoption of the principal of a unified bar as a means of correcting the ills existing within the profession. *In re* Lewkowitz, 70 Ariz. 325, 220 P.2d 229 (1950).

Phoenix. That evening was evidently full and lusty. Eighteen courses and three wines later, those present assimilated their coffee and cigars along with various presentations including the need for the Bar Association itself, early practice in Arizona, the ideal judge, the Supreme Court and dissenting opinions.

After this meeting, the next known one of record was held on March 26, 1900, in Phoenix. This effort led to the eventual incorporation of the Arizona Bar Association which occurred on June 7, 1906, when articles of incorporation were filed with the corporation commission in Phoenix. This organization died quietly and unnoticed in the year 1931, its twenty-fifth year, by statutory grace.

In 1916, four years after statehood, a meeting was called for the purpose of reorganizing what had been the Territorial Bar. Notices were sent to all of the attorneys who had been admitted to practice in the State and Territory, but on the date set for the meeting only eleven attorneys appeared. Officers were elected, and then the meeting disbanded. A second meeting of this same group was subsequently called, but only a few Phoenix attorneys appeared. Thus ended for some time any effort toward a statewide bar association.

Several years passed before the out-of-Phoenix attorneys attended any annual meetings, and it wasn't until 1924 in Globe that the organized bar was able to hold a two-day session with any sort of a crowd present. In fact, it was at this first meeting that the idea of an integrated bar was first discussed by Arizona attorneys.

Recently a national newspaper columnist described labor unions, medical societies and bar associations (in that order) as defensive organizations. At first blush, this might seem true, as far as bar associations are concerned, but delving under the surface just a mite presents an entirely different picture.

Attorneys have always been in the forefront of the development of our state and government. At first they appeared upon the scene as individuals—and rugged at that. Subsequently they banded together in small groups and later as a firm devoted group, cloaked with the authority of statute, made up of as diversified a group as to be found anywhere —but still rugged individuals.

To be a lawyer requires aggressiveness, ability, a willingness to stand up for what is right, and a willingness to lead. This type of men put their individual stamp on their organizations, and consequently our bar associations have been anything but defensive groups. They have met issues head-on and in many cases have brought about the solution of trying problems on their own initiative.[2]

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[2] For example, the Arizona Bar has initiated the following: Legal Aid; Lawyer

Our confreres of yesteryear laid the groundwork without doubt, but at what odds? One hundred years ago, a short time by historical standards, when the United States was preparing for a war between the states, an American court had yet to try a case in any of what is now Arizona. It was not until 1854 that the first case was tried in Arizona by an American court. Prior to that time, Arizona's welfare under Spanish, Mexican, Confederate, and American governments had been treated with little care or attention.

To know the Arizona Bar requires an intimate knowledge of Arizona history. From 1821 to 1848, all of Arizona was a part of the Republic of Mexico. After the region north of the Gila was ceded to the United States, the portion south of the line stayed with Mexico for nearly eight years—under the Gadsden Purchase in 1854.

Prior to 1848, the Mexican Territory of New Mexico and the Mexican Territory of California each had vague claims of jurisdiction over Arizona north of the Gila. The area north of the Gila was never seriously challenged by the Spanish, but it became the Anglos from the east who first disturbed the Indians' traditional wanderings in this area.

At the same time the breakdown of Spanish laws and authority paved the way for more commerce between New Mexico and California. Prior to this time commerce was solely between New Mexico and Mexico, California and Mexico, Sonora and Mexico, but never between the three northern outposts.

On February 4, 1828, the new Empire of Mexico created a union of the states of Sonora and Sinaloa under the name of Estado Interno de Occidente. The northern boundary of this State vaguely included Tucson and approached the Gila River. In 1830 the State of Occidente was dissolved and again Sonora and Sinaloa became two separate states.

Courts under the Spanish, and later the Mexican, regime were almost nil in the entire northern part of Mexico. Mexico retained the old Spanish law, whose higher courts were described as forming "a prolific hotbed of special pleading, chicanery and delay." In all of New Mexico under the Spanish Government (and later the Mexican) and Primirea Alta,[3] there were no attorneys. Courts were non-existent except for the local alcaldes (a combination of mayor and justice of the peace) who

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Referral Service; securing Judges' Retirement Act from Legislature; securing pay raises for the judiciary; creating better understanding between the bench and bar; stimulating the interest of the average attorney in affairs of his profession; examinations and admissions; conduct of all disciplinary proceedings with recommendations to the supreme court; adoption of all rules relative to admission, qualifications and discipline; creation of advantageous public relations program; maintenance of office and full time staff in Phoenix; close cooperation with the supreme court regarding rules of pleading, practice, and procedure; cooperation with Arizona Medical Society; and creation of convention rules of order.

[3] Roughly the southern half of what is now Arizona, and the northern half of what is now Sonora.

operated by appointment of the local military commander. The alcaldes operated under the power of the dreaded "baston de justicia" (the large walking cane), symbol of the alcaldes' power and jurisdiction.[4]

Prior to the actual creation by Congress of the Territory of Arizona, this area had always been dominated historically and geographically by the Gila River. From the time this area was in the hands of the Spanish until all of it was finally transferred to the United States by the Mexican Government, there was the ever-present delineation of "that portion north" and "that portion south" of the Gila River.

Petty theft and crime in this era went unpunished for the most part. This situation lasted until 1846 when the United States created the Territory of New Mexico, which included all of Arizona north of the Gila River. Technically, what is now Arizona north of the Gila came under the aegis of American rule and courts through the formation of the New Mexico territorial court system which divided the territory into three districts. District Two served Dona Ana County which was created out of what was then known as the Gadsden Purchase. The other two districts did not cover any of Arizona.

General Stephen Watts Kearney in 1846 took over New Mexico and issued a proclamation setting up American Civil Government in Santa Fe, with a code of laws, a bill of rights, and the appointment of various temporary officials, all of which was for a territory presumed to include most of what is now Arizona. For the first time the political institutions of the United States were technically applied to a part of Arizona.

In 1856 newcomers to Tucson consisted chiefly of thieves and cutthroats from Sonora and criminal outcasts from Texas and San Francisco.

> There was at this time no established government in Arizona. The nearest court of justice was in New Mexico, hundreds of miles away. So every man was a law unto himself, and the leading citizen was the fellow with the quickest trigger-finger or the deadliest knife.[5]

At first the oncoming American tide flowed along the principal rivers and in and out of the old villages, presidios and missions of Spanish times—the Rio Grande, the Gila, Santa Cruz, San Pedro, and the Colorado Rivers, along with the ancient colorful settlements of Santa Fe, San Antonio, El Paso, Tubac, Tucson, San Diego and San Francisco.

Justices of the peace, or alcaldes, were appointed by Dona Ana

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[4] POLDERVAART, BLACK-ROBED JUSTICE.
[5] F. LOCKWOOD, LIFE IN OLD TUCSON.

County in Tucson and Tubac, but their duties were not very arduous. Lawlessness in the Santa Cruz Valley was so bad that in August 1856, a convention met in Tucson and was created for the purpose of sending a petition to Congress asking that territorial government be created for the new territory named Arizona.

At this meeting the citizens of the Gadsden Purchase met in Tucson for the purpose of creating a new territory to be called Arizona, separate and apart from New Mexico. This new area included all of what is now Arizona south of the Gila River. The delegates represented the principal towns of the Gadsden Purchase, e.g., Tucson, San Xavier, and Sopori.

The coming of the Civil War caused interest in the Arizona Territory to dissolve, even though in 1858 President Buchanan in his mesage to Congress recommended a territorial government for Arizona, saying that its people "are practically without a government, without laws, and without any regular administration of justice. Murder and other crimes are committed with impunity."

> Congress failed to recognize a great principle which should always govern a civilized nation in its councils—never to acquire territory until it can extend over it the protection of law.[6]

It is at this point that history records the first lawyers in the Gadsden Purchase. The law did not take up their full time, and actually there was nothing in the way of courts for their practice.

1859 brought with it more discontent because of the treatment being received from the government of the New Mexico Territory. The federal judges had refused to hold court south of the "Jornada del Muerta" and within the limits of Arizona.[7] The *Weekly Arizonian*[8] then demanded a judicial district for Arizona which would sit twice a year in Tubac or Tucson, and twice a year in Mesilla. Nothing ever came of the demand.[9] Things then really came to a boiling point when on July 14, 1859, the *Weekly Arizonian* reported a meeting in Tucson where those present resolved not to vote in the forthcoming New Mexico elections.

When the citizens of Arizona realized that they could secure no help from the federal government, a meeting was held in Tucson to create the provisional government of the Territory of Arizona. It created a constitution, and appointed territorial officials and a supreme court,

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[6] J. Browne, A Tour Through Arizona (1864).
[7] Weekly Arizonian (Tubac), June 30, 1859.
[8] July 7, 1859.
[9] The Weekly Arizonian (Tubac), July 14, 1859, does mention the Probate Judge of Dona Ana County as being Rafael Buelas.

along with district courts. It was a provisional government which planned to function until Congress actually created a territory to be known as Arizona.

The provisional government first met in Tucson and set up its boundaries to include generally what is now southern New Mexico and southern Arizona (south of the Gila). The famous historian Bancroft[10] describes this as a "soi-distant government" which did nothing beyond appointing its officers.

The *San Francisco Bulletin* of April 16, 1860, relates that a special session of the supreme court of this provisional government was held in Tucson on April 5, 1860, for the purpose of admitting six attorneys to practice before the court. The Chief Justice was Granville H. Oury; the two associate justices were Edward McGowan and S. W. Cozzens.

Although history generally gives Coles Bashford of Tucson (and later Prescott) credit for being one of the first attorneys to be admitted to practice in Arizona Territory, with the present knowledge concerning the provisional government and the six gentlemen admitted in 1860, it would seem that the honor goes to one of these: W. C. Woodworth of Sonoita, Reese Smith of Arivaca, James A. Lucas of Mesilla, Frank Higgins, T. M. Turner, and T. J. Masten of Gila City.

A subsequent story in the *California Alta*[11] describes the failure of the government because the main officials resigned and the people lost confidence in it. This showed, however, the crying need for law and and order and the leading part played by attorneys in the attempt to seek good government.

But things were getting worse.

> Arizona was perhaps the only part of the world under the protecting aegis of a civilized government in which every man administered justice to suit himself and where all assumed the right to gratify the basest passions of their nature without restraint. It was literally a paradise of devils.[12]

Mark A. Aldrich became alcalde in Tucson. Aldrich had trained as a lawyer and had attended college but never practiced law in Arizona. On August 26, 1860, he was elected Judge of the Criminal Court in Tucson when, at a mass meeting of Tucson Citizens, a code of laws for the suppression and punishment of crime was adopted. He held this job until November 1, 1860, when he resigned in disgust because the citizens refused to help enforce the laws or to make complaints against anyone for any type of crime, including murder. Nothing could be done

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[10] BANCROFT, HISTORY OF NEW MEXICO AND ARIZONA.
[11] Sept. 27, 1860.
[12] Brown, *op. cit. supra* note 6.

with law and order except prosecution of a few minor cases of stealing. Aldrich said:

> If the time has arrived when a law-abiding portion of the community, either through fear of giving offense or for want of moral courage, fail to make the necessary complaint for the arrest and trial of those who commit a breach of the peace. I think they have no use for JUDGE or COURT; and, as Judge of the Criminal Court of Tucson, I resign the same.[13]

> The Vigilance Committee of San Francisco did more to populate the new territory than the silver mines. Tucson became the headquarters of vice, dissipation and crime. It was probably the nearest approach to pandemonium on the North American Continent. Murderers, thieves, cutthroats and gamblers formed the mass of the population. Every man went armed to the teeth and scenes of bloodshed were everyday occurrences in the public streets. There was neither government, law, nor military protection. The garrison at Tucson confined itself to its legitimate business of getting drunk or doing nothing.[14]

Later the Territory of New Mexico created a new county out of western Dona Ana County to be known as Arizona County, with Tucson as its county seat. This act was repealed two years later without having been ever really put into effect.

On August 1, 1861, the Confederate Army took over New Mexico, created the Territory of Arizona, which consisted of all of New Mexico south of the 34th parallel, and made Mesilla the capital. Territorial officials were appointed and judicial districts were set up. Under this organization, Dona Ana County still included Tucson. The Confederate jurisdiction lasted a little over a year, and as the Northern forces advanced down the Rio Grande Valley towards Mesilla, the Confederate capitol, the local court entered this minute entry:

> It appearing to the Honorable Court that in consideration of the disturbed condition of the county, it would be impossible to hold this term of court and conduct its business with satisfaction to the parties interested in suits pending herein, the court is adjourned to Monday, the 2nd day of June, 1862.[15]

But on June 2, 1862, things looked worse and court was never held.

After the departure of the Southern forces from the territory, once

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[13] Letter from Aldrich to "Citizens of New Mexico," November 1, 1860, on file at Arizona Pioneer's Historical Society.
[14] Browne, *op. cit. supra* note 6.
[15] 3 New Mexico Historical Review, No. 4, October 1928.

again the area was without law or order of any kind. So when the California Volunteers of the U. S. Army arrived in Tucson, the entire area was placed under martial law which was to last until civil law was created. This placing of the Gadsden Purchase under martial law was done in the Tucson plaza on either May 25, or May 26, 1862.[16]

From time to time attorneys popped up in the Gadsden Purchase and the Territory of New Mexico (that portion which included Arizona). There was Granville Oury, who later became chief justice of the provisional supreme court of 1860; also Palatie Robinson who came to Tucson in 1859. He did not devote too much of his time to the practice and made a much better name as a miner and merchant. *The Weekly Arizonian*[17] commented on a murderer who was "ably defended" by Col. R. A. Johnson, a Tucson attorney. Evidently this trial was a preliminary type of hearing because the defendant was sent to Mesilla for trial. Unfortunately Robinson killed Johnson and was tried by a military court in Yuma.

Samuel Cozzens was a practicing attorney in Mesilla and was very active in developing this part of the country. He was also something of a character and became known as "a great stickler for that writ of right, the habeus corpus—always has one at hand—carries it in his hat."[18] This description of Cozzens was published by Edward McGowan, an early day attorney in Tucson and Cozzen's cohort on the provisional court of 1860.[19]

Another first, or possible first, to be admitted to the bar in Arizona was Frank Higgins of Tucson and Mesilla. Higgins was admitted to the Confederate Territorial Bar on December 17, 1861. Prior to this time his name appears as having represented Simon Sanchez in a murder trial at Tucson.[20] Actually, this gentleman was identified more with New Mexico than Arizona, but was in that portion designated as Confederate Arizona.

At the time the Confederate Territory of Arizona was set up there were two judicial districts. The first district covered all the area east of Apache Pass, with Mesilla as headquarters. The second district was the area west of the pass with Tucson as the headquarters.

Thomas M. Turner appears on the scene from time to time, both

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[16] Sidney R. De Long, ms. in Arizona Pioneers' Historical Society.
[17] August 4, 1859.
[18] Weekly Arizonian, Sept. 29, 1859.
[19] Judge Cozzens again appeared on the scene when the Boston Daily Globe (Oct. 18, 1875) described a meeting of what was known as the New England Colony which was to be developed in northern Arizona. Judge Cozzens was one of the speakers extolling the joy of living in Arizona. The area to be developed by this New England group was located 130 miles from Prescott on what was known as the Rio Colorado Chiquito. (This sounds like an area around St. Johns.)
[20] Weekly Arizonian, January 28, 1860.

as an attorney and newspaper man, in Tubac and Tucson. He first came to Arizona in 1861, but was killed not too long after establishing himself in Arizona.

On March 4, 1862, President Lincoln appointed John A. Gurley as first Governor of Arizona. He died in August of that year before going to Arizona, and John N. Goodwin, who had been selected as Chief Justice, was made Governor in his place. William F. Turner became Chief Justice replacing Goodwin. The Associate Justices were William T. Howell and Joseph P. Allyn. The District Attorney was Almon Gage. In May 1864, the Territorial Government was moved from Fort Whipple south to a little community which had started on Granite Creek.[21] This mining town was named Prescott after the American historian, William Hickling Prescott. Previously it had been known as Granite and Goodwin City. Prescott thus became the first capital of the Territory of Arizona. Its atmosphere was one of Anglo-American, rather than the Spanish-Mexican atmosphere of Tucson. Wyllys describes Prescott as follows:

> It was as unruly a place as could be found in any section of the United States. Some indication of its wild character is shown by the story that the United States soldiers quartered there sometimes had better reason to fear the local citizens than the Indians.[22]

In 1867 the capital was transferred from Prescott to Tucson where it remained for ten years. Then in 1877 it was restored to Prescott where it stayed for twelve years until the permanent move was made to Phoenix. Governor Goodwin, in his farewell message to the First Territorial Legislature, among other things, said:

> Since its acquisition by the United States, the Territory has been almost without law or government. The laws and customs of Spain and Mexico have been clashing with the statutes and common law of the United States and questions of public and private interest had arisen which demanded careful but decided action.

With the creation of the territory a system of courts was organized from the justices of the peace through the probate and district courts up to the supreme court. Thus the first step was taken to battle the lawlessness and violence which paled by comparison the Indian resistance to the forcible entry upon their homelands.

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[21] At that time, Fort Whipple was located at what is now known as Del Rio, Arizona.

[22] WYLLYS, ARIZONA, THE HISTORY OF A FRONTIER STATE.

All territorial judges were appointed by the President of the United States. As a result, the majority of the judges first sent to Arizona were not versed in the ways of this country, and were complete strangers to the people, customs, and social existence of this area. Fortunately, for the most part the men turned out to be competent individuals and did a credible job as judges in the territory. The justice court level was greatly needed and remained in the hands of local people.[23]

At first the territory was divided into three districts with each judge presiding as a trial court in his own district. Then, once a year, the three judges would get together and sit as the Territorial Supreme Court. Later, five districts were created in the place of the original three.

The citizens of the territory, however, were strong for home rule and were soon very resentful of the courts being appointed by outsiders.

The supreme court was called the "Supreme Court of Affirmance"[24] since the trial judges also sat on the supreme court and were accused of "log-rolling" to protect each other. The citizens wanted elected judges, judges in each county, and the county court personnel to be absolutely separate and apart from the supreme court.

To enable the Territorial Government to proceed, a code of laws was needed. In addition, a great need was present to meld the two types of culture and background, which met for the first time, to create what would soon be a great state. Our original code seems to have served this purpose. Prepared by Judge William T. Howell, it was designated as the Howell Code. With this new code, the new courts in 1864 were ready for business along with attorneys who were to practice in these courts.

In a quaint merchandise ledger, and written in longhand is *The First Journal District Court of the First Judicial District of Arizona.* This book covered the entries from May 31, 1864, to April 16, 1874. It is in this record that the first trials held in Arizona under American jurisdiction are recorded.

In setting up the judicial districts, the Territorial Governor made

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[23] In 1864, Charles H. Meyer, a druggist by profession, was elected Justice of the Peace. During the 1860's and the 1870's he became a terror to the so-called bad men. Lockwood says:

> He did not pay as much attention to the letter of the law as he did to the facts involved and to fundamental justice. Indeed, he knew very little law. It was said that his law library consisted of only two books: A volume on *Materia Medica* and one on *Fractured Bones.* When a very perplexing case was brought up before him, in order to gain time, to clear his mind, and make an impression, he would take down these two books and study them intently. His salty and straightforward decisions were so much in the interest of honesty and good order that the worthier members of the legal profession would use all their ingenuity to interpret the law in such a manner as to square with the decisions of the Judge; though able lawyers sometimes found it exceedingly hard to do this.

[24] Territorial Expositor (Phoenix), Dec. 24, 1880.

three districts, one of which was located in Tucson.[25] The second district was created for La Paz, and the third district was at Prescott.

Judge William T. Howell presided at the first trial under American jurisdiction which was held in Tucson on June 3, 1864. It involved a mortgage foreclosure in Tucson and was a civil suit. The first criminal case tried under the American regime was a murder case involving one Dolores Moore. A Tucson attorney by the name of J. E. McCaffrey had the distinction of being the first court-appointed attorney in the Territory when he was designated by the court to defend this lady in the murder trial. The trial began December 17, 1864, and by December 30 of the same year the jury had been selected, the lady tried, found guilty, sentenced, and motion for the new trial denied. She was sentenced to hang by the neck until dead. And so she was.

Prior to these trials the United States District Court for the First Judicial District in Tucson convened the first grand jury in May 1864. Judge William T. Howell presided at the impaneling and swearing of this jury and gave them this charge: "With your action today commences the judicial history of a country whose area is sufficiently extensive to form the seat of a powerful empire."[26]

The Second Judicial District held its first court session in La Paz in June 1864, with Judge Joseph Allyn presiding. But, there being no business, the court adjourned as promptly as it convened.

The Supreme Court of the Territory of Arizona held its initial meeting in Prescott on December 26, 1865. Chief Justice William F. Turner and Justice William T. Backus presided at this session held in the legislative council chamber. The first order of business was the selection of Marcus D. Dobbins as clerk; next, the sheriff of Yavapai County was ordered to secure stationery for the use of the court. Then seven persons presented themselves for admission to law practice in Arizona. The seven who were admitted on December 26, 1865, were: Coles Bashford, John Howard, William J. Berry, James A. Robertson, James Anderson, Joseph P. Hargrave, and C. W. C. Rowell.

Bashford, Anderson, and Hargrave were requested by the court to prepare "Rules for the Government of the Practice of this Court." These were prepared and presented to the court the following day (December 27, 1865). In all, there were 32 rules covering all phases of appellate procedure which covered a total of five and a half pages of legal size paper, all in handwriting. These same three gentlemen were also ordered to prepare rules of practice for the district courts, which rules were to be ready for the next term of the supreme court. All of these records are

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[25] "All that portion of said Territory lying south of the Gila and east of the 114 degree of longitude west from Greenwich."
[26] Arizona Miner, June 22, 1864.

maintained in the supreme court in a book described by a clerk of the 1890's as being an "old worn leather bound Book entitled 'Records'." This same book carried the names and signatures of all admitted to practice in Arizona up to 1896.

Evidently the signing by members of the bar was rather a haphazard affair since the first signature was that of William Herring who was admitted in Tombstone in 1882, and it is followed by that of William H. McGrew, who was also admitted in 1882. Yet, Coles Bashford, who was one of the first seven to be admitted in 1865, did not get around to signing the book until 1885.

The records indicate that up to the year 1896 all attorneys desiring to practice law in the territory could be admitted by the local district court. This was tantamount to being admitted by the supreme court; and, if at a later date the party was able to appear in Phoenix and sign the roll of attorneys, that would be good. In the meanwhile his admission before one of the district courts was sufficient to allow him to practice law anywhere in the Territory of Arizona.

The book in use today and ever since 1896, is entitled *Roll of Attorneys—Supreme Court of Arizona 1894.* Across the top of each page in this book, which has been signed by every attorney practicing today in Arizona, is this legend: *United States of America—Territory of Arizona—Supreme Court.* C. O. Anderson of Mesa (and later of Holbrook and Willcox) was the first to sign the current book. His name was recorded January 20, 1896.

When the new book was started, somebody very carefully copied the first page of names—thirty-nine in all—listed in the old record, but evidently completely forgot to copy the remaining 109 names listed on the subsequent pages.

The first woman admitted to practice in Arizona was Sarah Herring Sorin. She signed the old record book in 1893 and then came back in 1900 to assure her position by signing the new book *nunc pro tunc* 1893.

Arizona began its official existence with four counties: Pima, Yuma, Yavapai, and Mohave. After a year, the northern part of Mohave was cut off and became Pah-Ute County. Then the federal legislature in its congressional wisdom gave most of Pah-Ute to the new State of Nevada, and what little bit remained in Arizona was returned to Mohave.

As has already been seen, Tucson and Pima County had the first attorneys practicing in the territory, and these were mainly those left over from the Gadsden Purchase days. To this group were added, in 1865, Mortimer R. Platte and John Anderson. Mortimer began his practice in Tucson in the partnership of Platte and McCaffrey, and, in addition to this, also had the government mail contract from San Diego to Mesilla. The coming of the railroad eased him out of the mail business, and in time he left Arizona and the law practice. John Anderson began

his practice in Tucson but soon after the founding of Nogales he moved there and for a time was a member of the Pima County Board of Supervisors representing the district from Nogales.

Beginning in 1888, attorneys practicing in Pima County signed a register or roll of attorneys admitted to practice in the District Court of the First Judicial District in and for the County of Pima. A similar type roll was being signed by attorneys in Pima County as late as 1941.

The first attorney to practice in Mohave County was Alonzo Edward Davis. He originally came to Arizona with the California Volunteers and was stationed within the territory for two years. After his discharge be became a resident of Mohave City, Arizona Territory. He was admitted to the Bar on October 23, 1866, having obtained his legal education by studying law during his time in Arizona with the Army. In addition to Mohave City, he also lived in Mineral Park.

Davis became District Attorney for Mohave County in 1870 and in addition to his practice was also well-known as a merchant and miner. The *Walapi Enterprise* of June 1, 1876, carried Davis' card showing he was an attorney authorized to practice law in the territorial courts.

La Paz, Arizona, was the headquarters for the Second Judicial District created upon the establishment of Arizona Territory. One of the earliest attorneys to be admitted in La Paz, which included Yuma, Mohave, and Pah-Ute Counties, was William J. Berry, admitted on June 28, 1864. During his tenure he was District Attorney of Yavapai County in 1868 and later was District Attorney in Yuma County in 1875. In addition he was editor of the *Arizona Sentinel* published in Yuma.

Yuma became the first town to be built after the Gadsden Purchase had been annexed to the United States. The Yuma Crossing had been known to both the Indians and the white man for several centuries, but the first town developed under American jurisdiction on the east bank of the Colorado River brought forth the following individuals who practiced law: Judge El Rowel from San Bernardino, who, soon after his arrival, ran for district attorney; Judge W. Alexander, who practiced in Yuma and then moved on to Phoenix; John Mullen, George Knight and Joseph Walker. These men were "unmarried and had no obligation for stability."[27] The first courthouse was built in Yuma in 1872.[28]

In 1864 Henry Nash Alexander came to Yuma, but he did not begin to practice law there until 1872. In 1874 he was appointed the Probate Judge and in 1879 ran for, and was elected, District Attorney for Yuma County. His son-in-law was Chief Justice A. C. Baker, Territorial Su-

[27] Rev. Paul Figeroa, ms. in Arizona Pioneers' Historical Society.
[28] In 1870 the county seat of Yuma County was moved from La Paz to Yuma.

preme Court. His son, J. L. B. Alexander, was Clerk of the Supreme Court.

The new territorial government in Prescott caused many of the new attorneys of the area to focus their attention on Yavapai County. While Tucson still represented the Spanish and Mexican influence, Prescott stood for the Anglo background which was finding its way westward.

Already two changes had been made on the supreme court. Joseph Pratt Allyn had run for delegate to Congress in 1865, but was defeated. He then tried to be appointed Governor, but again was unsuccessful. Although he claims not to have resigned from the court until March 13, 1867, he left the territory soon after being turned down for Governor in early 1866. Meanwhile, Judge Backus was firmly installed on the bench in late 1865 in place of Howell. Harley H. Carter replaced Allyn.[29]

In addition to the seven men admitted in 1865, other early Prescott lawyers described are John C. Herndon, John J. Hawkins, Tobe Johnson, T. G. Norris, Henry D. Ross, Robert E. Morrison, and E. W. Wells. James Anderson came with the new government but did not remain very long.

A. H. Favour described Judge E. W. Wells as follows:

> He came to this state in 1864, and has made Prescott his home ever since. He is the Dean of the Arizona Bar. He has held many public positions with honor and distinction. As an attorney, legislator, district attorney and judge, and member of the Constitutional Convention, he exemplifies the finest type of a lawyer, and as a citizen he is honored, respected and loved. We can well take pride in claiming him as our first citizen.[30]

The central part of the territory was growing at a great rate around the newly-founded town of Phoenix, and in 1875 Maricopa County was created out of Yavapai and Pima. A journalist in a San Diego newspaper (March 5, 1872) wrote of Phoenix:

> . . . [A] smart town which had its first house completed about a year ago. When it has become the capital of the territory, which it will, undoubtedly, at no very distant day, and when the "Iron Horse" streams through our country on the Texas-Pacific road, Salt River will be the garden of the Pacific slope and Phoenix the most important inland town.

James Taber Alsap, prominent in both law and medicine, came to Prescott in 1863 and later moved on to Phoenix. Prior to his arrival in

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[29] Chief Justice Turner resigned in 1871 and was replaced by John Titus.
[30] Favour, The Messenger (Phoenix), 1928.

Prescott he had practiced medicine in California for approximately 10 years. Alsap was not admitted to the Arizona Bar until 1872, which was after he had moved to Phoenix. In addition to being the first mayor of Phoenix, Alsap also practiced law in this community and was a great booster of the Salt River Valley. In 1872 he previewed the greatness that would in time come to the Salt River Valley in an original document entitled *Reference to Resources of Salt River Valley*. The original of this is in the Secretary of State's office and in part contains this statement: "It is a very simple process to get a farm in this vicinity. A man settles on a quarter section and that is as good a title as need want for the present."[31]

Although 1875 saw the creation of Maricopa County, the earliest records of the district court for that county found in the Maricopa County Clerk's office are a minute book and court calendar beginning with the year 1879. The first case numerically listed begins with the number "7." The first attorneys listed in these minutes are A. C. Swift, A. D. Lemmon, J. W. Van Slyek, H. B. Summers, and William A. Hancock. The name of Granville Oury is very much present on these early records, but he never actually was a resident of Phoenix. Thomas Edwin Farish[32] states that the first attorneys admitted to practice in Maricopa County, on May 7, 1872, were William A. Hancock, E. Irvine, John T. Alsap, and J. R. Barrocke.

Next to be created was Pinal County, with the original county seat in Hardyville.[33] Pinal was created out of Pima, Yavapai and Maricopa in 1865. John W. Anderson is described as the first attorney to ever practice in Florence, Arizona. The records show that Granville Oury practiced in Florence after he left Tucson, but they are rather hazy as to when he actually went there.

Yavapai again came under the knife when Apache County was created in 1879 from the eastern edge of Yavapai. For a very brief time the county seat was Snowflake, but it was transferred to St. Johns. Probably the first lawyer who resided and practiced in Apache County was Robert E. Morrison, who later moved on to Prescott. The Morrison family had lived in Springerville, but at that time there was not sufficient practice to keep an attorney engaged full time. So most of the attorneys who engaged in practice in the northeastern part of the state were usually those who came to the county seat with the court at such times as the district court was traveling the circuit. This continued on up until the time of integration when the Navajo-Apache Bar Association was organized.

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[31] Neri F. Osborn, ms. in Arizona Pioneers' Historical Society.
[32] FARESH, HISTORY OF ARIZONA, 213.
[33] Florence Enterprise, July 11, 1891.

In 1881 Cochise was created out of Pima with the county seat at Tombstone where it remained until moved to Bisbee in 1929. Tombstone in 1884 had probably as many attorneys as any city in the territory.

At its first session on May 16, 1881, the Cochise Court, after admitting twelve men to the practice of law,[34] was immediately embroiled in a contest between two members of the bar as to which one was the duly appointed and acting district attorney. Judge W. H. Stilwell ruled that Lyttleton Price (the Governor's appointee) was the district attorney rather than J. M. Millier (the Board of Supervisors' appointee).

An interesting item of this era was the court calendar prepared for the call of the calendar or law and motion day. This document was printed and divided the court's work into three parts: criminal calendar (by far the largest), law calendar, and trial calendar. Each of the three divisions was further broken down with the name of the case, the kind of case, and the names of the attorneys of record. No doubt these were printed because typewriters were not then standard equipment, and writing the voluminous calendars in longhand would be a rather tedious chore for the clerk.

The calendar printed for the November 1882 term in Cochise County ran seventy-nine pages. This same calendar carried the names of fifty attorneys who were described as the "Members of Cochise County Bar." However, the following year the calendar listed only forty-two members. Pima County's printed calendar for 1884 listed thirty-seven "Members of the Tucson Bar."

1881 also saw the creation of Graham and Gila Counties. Graham was created out of Pima and Apache, while Gila came from Pinal, Maricopa, and Yavapai. The Minute entries in the Graham County Clerk's Office show that the district court held its first session in Graham County on November 5, 1883, at Solomonville. The attorneys opposing at that session of court were B. H. Finely, C. C. Stevens, J. A. Zabriskie, P. J. Boland, and P. M. Thurmond. All of these gentlemen practiced in Solomonville, which was then the county seat.[35]

Boland was evidently a giant of a man and somewhat of a character. During an interview he described his birthplace as Ireland, and his occupation: "Prospector when I could find a deposit or even a stringer; a promulgator of the doctrines of Blackstone and an expounder of Kent

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[34] V. A. Gregg
Marcus P. Hayne
J. M. Murphy
P. T. Colby
J. F. Senis
J. W. Stump
H. K. S. Melveny
Theron Reed
J. F. Culton
A. G. P. George
Marcus A. Smith
Allen R. English

[35] During the American history of Arizona, there have been five changes of county seats: Cochise County, from Tombstone to Bisbee; Graham County, from Solomon-

when my friends fall out and resort to law; and, finally, a jack of all trades."[36]

The District Court's meeting in Solomonville was always described as a lawyer's picnic. It was here that the famous story seems to have originated about the judge who ordered a shirt-sleeved juror to go home and get his coat. The juror silently left and did not return for three days. Upon his return he was upbraided by the judge for being gone so long, but he explained that his home was many miles distant, that he had to go by horseback, and it took three days to make the round trip. Strangely enough, this story has been told of numerous judges. It has even been attributed to justices of the peace and goes back many years. Probably the true originator of the story will never be known unless he happened to be the first juror ever chosen who came to court without his coat.

Early practitioners in busy, thriving Globe with its exploding mining development were Gustavus A. Swasey (Gila County's first probate judge), Aaron A. Edwards, George K. French, and John W. Wentworth.

Coconino County was created in 1891 and was followed by the new counties of Navajo, Greenlee, and last of all, Santa Cruz. Early practitioners in the District Court in and for the County of Coconino were H. D. Ross (District Attorney), W. L. Van Horn, D. M. Doe, T. G. Norris, E. E. Ellenwood, J. E. Jones, and J. J. Hawkins.

Volume 1 of *Arizona Reports* lists 109 attorneys practicing in the Supreme Court of the Territory of Arizona from its organization up to the year 1883. The first reported case by the Supreme Court of the Territory of Arizona, in the Arizona Reports at the January term, 1866, was *Davis v. Simmons.*[37] It was the only case reported during this term. No further cases were reported by the Territorial Supreme Court until the January term of 1871, when only one case was heard. The next term was January 1872.

Oddly enough, it has been pointed out that the name of William T. Howell (first judge to convene a grand jury in Arizona; presided over the first trial in Arizona; author of our original code) had been omitted from the list mentioned above. As can be best determined, he was here solely in a judicial capacity, and even though he authored our first code, there seems to be no record of his actually practicing law in Arizona Territory.

By 1884 the *Gazateer and Business Directory,* which covered a greater portion of the west, showed that not only were there attorneys practicing in Phoenix, Tucson, Prescott, Yuma, and Bisbee, but that one

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ville to Safford; Apache County, from Snowflake to St. Johns; Yuma County, from La Paz to Yuma; Pinal County, from Hardyville to Florence.

[36] Arizona Weekly Star, Feb. 17, 1881.

[37] 1 Ariz. 25, 25 Pac. 535 (1866).

of the largest groups was practicing in Tombstone, to say nothing of those who had hung out their shingle in Mineral Park, Tip Top, Vulture, and Bueno. Well represented on the list were Benson, Florence, Clifton, Globe, Kingman, and Yuma.

Although attorneys were operating throughout the territory, the first organized bar of record was the meeting in 1895. Quiet then reigned until 1900.

The first known minutes of an organized bar in Arizona were minutes kept in a large, bound ledger book which, in handwriting, was entitled "Bar Association of Arizona, 1900-1905." All of the entries in this book were made in handwriting, and it contained, in addition to the minutes, the by-laws of the Bar Association itself. The first entry of minutes is dated March 26, 1900, and, in addition to showing the election of new officers, shows that the treasury had a balance of $2.20. Evidently the organization dated back to 1899 inasmuch as the presiding President at that time was Judge A. C. Baker and the newly elected President was Judge J. J. Hawkins.

The next meeting was on January 14, 1901, at the supreme court room in Phoenix. The Secretary reported that the books of the association were lost. Therefore, not much business was transacted at this meeting.

The reading of minutes of the next annual meeting of January 15, 1902, was waived inasmuch as the books had been lost and no minutes were accessible to be placed in the book. The treasury still had the $2.20 left over from 1900. Although the original by-laws provided for annual dues of $1.00, it was obvious that none of the members had gotten around to paying. The President chided the Bar severely for doing nothing but meeting once a year and electing officers. He charged that they should be more alive to the offices to which they had been elected and must read legal papers on various subjects which had been assigned by him. The papers which had been assigned for reading at this meeting were not prepared, but at least they were able to raise the dues to $5.00 a year.

The next meeting was held on January 12, 1903, and in the interim the treasury picked up $160. A move was made to incorporate the Bar Association, but this failed. A motion was passed to draft a new constitution and by-laws. The minutes reflected the crying need to revise the Civil Code of the Territory, and so a committee was appointed to draft a bill to correct the errors in the Code (this must have been the Revised Statutes of 1901). The committee was also authorized to present this bill of correction to the Judiciary Committee of each house of the Legislature. A banquet was arranged to be held at the Hotel Adams in Phoenix on January 17, 1903, at a charge of $5 per person. The committee was not ready to "report on the names of those to whom toasts

would be assigned." The legal papers which the president of the year before had demanded were reserved for presentation at the banquet. History is silent as to whether these papers were ever read or presented at the banquet itself.

On January 11, 1904, the annual meeting was again held in Phoenix and the Committee on Code Correction reported that it had worked very hard and made many corrections. So it was given $40 to print the corrections. The Constitution and By-law Committee reported that it had made no progress and that it still needed more time. A committee was appointed to draft a bill on appeals. Meanwhile, the banquet at the Adams Hotel was in line for that evening.

A special meeting of the association was held in Phoenix on October 3, 1904. The conduct of two of the members had been questioned and they requested that a meeting be held to investigate the charges and to go into their qualifications. This motion failed and the meeting adjourned.

On December 22, 1904, a special meeting was held by the bar association at Phoenix for the sole purpose of protesting the admission of Arizona and New Mexico as one state into the Union. This particular resolution was printed on a small sheet and pasted into the Minute Book. No doubt other copies were used as propaganda and as throwaway sheets to show the stand taken by the lawyers on this particlar issue.

The resolution protested very vigorously the combination of Arizona and New Mexico as one state because it would not only violate a sense of local pride, but would subject all Arizonans to the domination of a majority of heretofore strangers living under different institutions, different customs, different laws and rules of property, different trade relations, and, in addition, most of whom could not understand, read, or write the English language. The resolution went on to state that it would involve either a concession by them of their laws, customs, and habits, or a violation and abandonment of ours. It would create a state too big and in so doing would violate one of the cardinal principles of American institutions—that the more nearly within the actual observation of the people the functions of government are exercised, the safer these instituions are, for they tend to be more economical, honest, efficient, and capable. The combination would result in a distasteful union imposed upon unwilling people.

The resolution provided for a committee of five which was to go to Washington, D. C., to protest the proposed union of both territories. This committee was also delegated to find ways and means of financing the trip. How this was done the record never says.

The final entry in this interesting old ledger book records a meeting held in Phoenix on January 9, 1905. Motions to carry on a regular busi-

ness session failed. The only thing done was to elect new officers.

In the following year, 1906,[38] the Arizona Bar Association was incorporated, and officers were elected each year until 1912, nonetheless no records of minutes of any kind have we been able to find or locate.

In reviewing the short history of the Bar prior to statehood, the 1912 record related that the Arizona Bar Association had more or less active existence for many years prior to 1906. Papers were read and an effort was made to give the Association reason for its existence extending beyond the mere social function of the annual dinner. The desire to render the Bar more efficient crystallized in 1906 with the incorporation "which seems to have exhausted the unusual vitality so manifested, for until the year 1911-12, the Association was no more vigorous than before."

Outside of a printed booklet containing the By-laws and Articles of Incorporation of the Arizona Bar Association, the written record is again silent until a statewide meeting was held on March 18-19, 1912, in Phoenix, right after statehood.[39] Papers were read at the meeting and one of them rather caustically treated the subject of "reversals for technical reasons." The Association adopted the ethics of the American Bar Association. A motion was then made to endorse Richard E. Sloane as Judge of the United States District Court. Sloane had been on the Territorial Supreme Court, and was the last Governor of Arizona Territory. The Attorney General, George Purdy Bullard, after expressing his high personal regard for Judge Sloane, moved to table the motion for "purely political reasons." The motion failed.[40]

The banquet committee had failed to report back as to the preparations they had for the big session, so a new one was appointed to arrange a feast for the same night. The numerous papers which had been prepared for presentation at the convention were all printed and copies passed out rather than reading them at the convention itself. The

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[38] John B. Wright, ms. in Arizona Pioneers' Historical Society. In 1906 a Memorial presented to Congress seeking statehood for Arizona included among those signing the following lawyers: George K. French, Nogales; Roy S. Goodrich, Phoenix; Robert E. Morrison, Prescott; Eugene Brady O'Neill, Phoenix.

[39] Just fifty years from the date that Jefferson Davis made Arizona a Territory of the Confederate States of America, President Taft signed the bill making Arizona the firty-eighth state of the United States. One of the proud witnesses to the signing of this bill was Thomas Molloy, Yuma attorney, who was to be father of Judge John F. Molloy of the Superior Court of Pima County. Prior to statehood, Taft had made the Constitutional Convention of Arizona remove from its constitution the provision that judges could be recalled. However, one year after being admitted to the Union, the Arizona voters promptly reinstated this provision in our constitution. During the time that this issue was being dealt with by our Constitutional Convention, the chaplain of the Convention opened one of the sessions in this manner: ". . . and Lord, we hope that President Taft will not turn down the Constitution for a little thing like the initiative and referendum."

[40] Judge Sloane had been appointed by President Taft, but failed of confirmation; subsequently, President Wilson appointed Judge William Sawtelle whose appointment was confirmed.

federal district court in Phoenix convened that same day for the sole purpose of admitting to practice in a body all members of the new Bar Association of the State of Arizona. Joe Morrison of Phoenix moved the admission of the entire bar and vouched for their good moral character. Judge William W. Morrow of the Ninth Circuit Court, who came to Phoenix to organize the new United States District Court, felt that Mr. Morrison was taking quite a chance!

When the first territorial officials arrived in Arizona they immediately realized that the laws under which they were required to act were so ill-adapted to the conditions existing in Arizona that a new code was required to be drawn up. Judge William T. Howell immediately got busy. By the time the legislature appointed him as the Code Commissioner, he was in a position to return to them a brand new Code on the day of his appointment. Only 250 copies were printed, and they were without an index and with only a paper cover. This remained the law and code of Arizona from the time it was created until 1887.[41]

Although the bar entered another period of inactivity, nonetheless the profession was operating on a foundation which had been well and carefully laid during the organizational years of the territory and later of the state. Courts were organized, districts were laid out, and law enforcement at least got its start towards what we know as such today.

When our national government at long last took some interest in the people residing in the territory of Arizona, it was immediately faced with the fact that an attempt was being made to impress upon a large number of these people a culture, government, and philosophy entirely different from the one under which they had lived for centuries. There were the possibilities of cultural, governmental, and religious strife, but fortunately these were worked out. Our code of laws was one of the most monumental works in attempting to bring about the melding of centuries of radically different civilizations. This perhaps is best described in connection with the water laws created by William T. Howell in the initial Code. The foundation of his law on water rights has been described as:

> . . . [T]he written and unwritten laws of Mexico, handed down from the civilization of the valleys of the Tigris, Euphrates, and Nile, carefully sifted and formulated by the brightest minds of Greece, Rome, Carthage, France, Spain, and Mexico. From these he formulated the present law for the protection of the irrigators of Arizona, em-

[41] One of the earliest laws passed by the Legislature provided: "No indebtedness or liability heretofore incurred against any person prior to his or their arrival in the territory, shall be binding or have any effect whatsoever, or be in any way enforced in any court for the term of four years from the date of the passage of this Act." No doubt this made things a lot easier for many of our new citizens.

bodying the experience of the irrigating world . . . .[42]

Actually a code with an index, known as the Compiled Laws of 1871, had been prepared, but the Legislature did not pass this code. The 1871 code had been compiled by Coles A. Bashford.

In 1877 John T. Hoyt, a Prescott attorney, was appointed commissioner to compile the 1877 code. The 1887 provisions were made for the revision of the laws, the first since the Howell Code. Three attorneys were appointed to make this revision: Cameron H. King, Ben Goodrich, and Judge E. W. Wells. For the first time the criminal code was separated from the civil code, and each had its own index.

The next revision of our code was made in 1901 by Judge C. W. Wright of Tucson, J. C. Herndon of Prescott, and L. H. Chalmers of Phoenix. The Revised Statutes of 1913 and the Penal Code of 1913 followed next and were prepared by Judge Samuel L. Pattee of Tucson. This was then followed by the Revised Code of 1928 (prepared under the supervision of Judge Fred C. Struckmeyer), the Arizona Code Annotated of 1939, and Leslie Hardy's current Revised Statutes of Arizona, 1956.

Because of the limited number of Howell Codes printed, and the length of time since the printing was done, it is not surprising to discover that there are not many complete sets of all the code and session laws of Arizona. Only a few complete sets are in existence today (State Law Library in Phoenix, United States Congressional Library, Southwest Museum in Los Angeles, Harvard Law Library, Statute Law Book Company of Washington, the late E. E. Ellinwood of Phoenix, and the late Alpheus H. Favour of Prescott). Even the University of Arizona College of Law does not have a complete original set.

In the early days of territorial practice, and continuing into the twentieth century, it seemed to be very much the accepted custom for attorneys and lawyers to advertise in the local newspapers. One of the outstanding papers of the times was the one in Prescott which carried a large number of advertisements or "cards" inserted from time to time by various attorneys. In some cases these insertions ran one or two years, and in others the ad was just for one particular issue. It was not uncommon for attorneys at that time to advertise in papers throughout the Territory, and the ads would, in a very genteel but forceful manner, point out the type of work they did, their excellence, plus price mod-

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[42] Charles T. Hayden, ms. on William T. Howell (1891), in Arizona Pioneers' Historical Society.

Another excellent example of this is Arizona's basic venue statute based on the Texas model, which in turn is based on old Spanish statutes: McKnight, *The Spanish Legacy to Texas Law*, 3 AM. J. LEGAL HIST. 299 (1959). See ARIZ. REV. STAT. § 12-401.

eration which could not help but rebound to the benefit of the prospective client.

Platt & McCaffery had advertised their legal business in Tucson.[43] In the March 25, 1871, issue of the *Weekly Arizonian*, appears this ad:

> Jno. Anderson, Conveyancer. Deeds, mortgages, powers of attorney and agreements drawn up and acknowledged. All kinds of legal papers prepared; collections made. Charge moderate. Office: First door south of the Governor's Mansion, Tucson.

The *Arizona Citizen*[44] in Tucson carried the ads of three attorneys, along with one for a doctor, one for a shaving saloon, a surveyor, and a purveyor of hay and grain. One attorney stated: "Will promptly attend to all claims placed in my hands against the United States Government." The *Prescott Miner* of June 2, 1882, carried an advertisement of Colonel Edgars who practiced the legal profession in the second story of the Nathan Ellis Building in Prescott.

In line with the ads or cards carried, the newspapers would also eulogize, and sometimes denounce, various of the territorial attorneys in the news columns. Editorializing was not necessarily restricted to the editorial page and so the good points, or bad, of the particular attorneys could be found from time to time spread throughout the pages of the territorial newspapers. For example, John A. Anderson of Tucson was described by one of the Tucson papers as being the best pleader of legal points in the city. The *Arizona Citizen*[45] described him as never being at a loss for positive authority, "with none of the buncombe that marks a secondary class professional, he takes a stand with the leading members here."

In the *Tucson Daily Citizen* of January 5, 1889, there were carried legal cards from about ten of the leading attorneys in Tucson. With one exception, the cards all modestly proclaimed only the attorney's name, the fact that he was an attorney, and his address.

Today's senior members of the bar who practiced in the days of the ads and "insertion" cards are not all in accord as to whether or not such advertising was proper even then. Naturally, there were no rules of ethics to govern the attorneys and some seemed to feel that the insertion of the card was permissible while others denounced it as purely advertising and something unethical and below the standard required for a reputable attorney. As one member said, "Everybody practiced law to suit himself."

One of the leading attorneys in Yuma became embroiled in a run-

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[43] Weekly Arizonian, Oct. 2, 1869.
[44] Dec. 3, 1870.
[45] March 15, 1884.

ning fight with the *Weekly Arizona Miner* of Prescott over the publication of a legal card which the paper had been running on behalf of the Yuma attorney. The paper claimed it had been requested to run the ad for a much longer period of time than the attorney stated was true. But the attorney would only pay for the amount for which he had contracted. So the newspaper ran a complete story[46] of the entire transaction, and it might be fair to say that the version so printed was not favorable to the attorney. He was generally accused of "sharp practice" because he would not pay his bill. Not long thereafter one of the Phoenix papers took up the bone and said it served the Yuma attorney right because he should pay up if he owed the money. The *Arizona Sentinel*[47] at Yuma made its columns available to their local man and he presented his version of the entire affair in strong and cogent language. In none of the cases did the participants seem particularly concerned with or perturbed by the law of libel. Later on, the same Yuma attorney was described as one of the "ablest limbs of the law" by the *Arizona Weekly Enterprise*[48] at Florence. So amends must have been made somewhere along the line.

Another time, an attorney was denounced by one of the Phoenix papers for having defended two criminals who were charged with holding up the paymaster for the United States Army on his way to Ft. Whipple. The paper accused the attorney of having been paid by the money taken from the paymaster, and after this printed deluge, the attorney turned back the funds he had received as his fee (to the government, it is presumed).

The *Arizona Weekly Enterprise*[49] praised Florence attorney, John Witherspoon Anderson, in this manner: "The Venerable Judge had served several terms in the Arizona Legislature, and even this body failed to corrupt his morals; in taking this into consideration, we cannot but pronounce him proof against all kind of vice."

But the *Arizona Republic*,[50] when commenting on one of the candidates for Mayor, said he ". . . was the only person in Phoenix pretending to be a lawyer who fell so low as to act as an attorney for the swindler Reavis . . . ."[51]

Another paper did not hestitate to discuss a certain attorney's "love of the cup" and pointed out that if it hadn't been for this great and continual love feast, this particular man would have made an excellent at-

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[46] Weekly Arizona Miner (Prescott), March 28, 1879.
[47] April 5, 1879.
[48] Feb. 25, 1882.
[49] May 29, 1886.
[50] April 26, 1893.
[51] Here, reference is made to James Addison Reavis, known as the "Baron of Arizona." See Powell, *The "Baron of Arizona" Self-Revealed: A Letter to his Lawyer in* 1894, 1 ARIZONA AND THE WEST 161 (1959).

torney. His activities with the cup are described in detail and the article concludes in somewhat this vein: "So long, Judge, it's a long time between drinks."

"A scandalous affair—seeks another man's wife" is the lead-off in a story of the *Weekly Arizonian*[52] when the paper went into great detail on how one of the legal lights of Tucson had attempted to steal another man's wife on her wedding night.

One of the early appointed territorial judges, H. T. Backus, proceeded to set aside as unconstitutional various acts passed by the early legislature. As a result of this, the newspapers throughout the state went after him unmercifully, reflecting not only on his legal ability and his ancestry, but describing how he never went anywhere unless his way was paid, and stating that he was never known to soil his lily white hands with work—especially honest work.

In Yuma the *Arizona Sentinel* was edited by a lawyer named William Jeans Berry who also plied his trades as a lawyer and gunsmith. In fact, when he wasn't editing a news sheet, his shingle always carried the designation "Attorney at Law" and underneath that, "Gunsmith." During his editorship he undertook to seek and woo a mate in this manner:

Wanted:

A nice, plump, healthy, good-natured, good-looking, domestic and affectionate lady to correspond with. Object—Matrimony.

She must be between 22 and 35 years of age.

She must not be a gad-about or given to scandal, but must be one who will be a help-mate and companion, and who will endeavor to make home happy.

Such a lady can find a correspondent by addressing the Editor of this paper, Post Office box 9, Yuma, A.T.

Photographs exchanged!!

If anybody don't like our way of going about interesting business, we don't care. It's none of their funeral!!

Another time, in his issue of July 8, 1876, a criminal case about to be tried was reported. The case had created much local interest and so the editor directed a great deal of attention to the coming event. Witnesses were described, the facts of the case were discussed, and in closing, the editor named the defense attorney in glowing terms, describing how fortunate the accused was to have this man defend him. The editor congratulated the defendant for having "one of the best defense attorneys in the territory (when he is sober)."

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[52] Jan. 14, 1871.

The papers carried detailed stories as to the cases being heard by the territorial supreme court. The facts of the cases were related, and the articles stated which lawyers were present, and then usually closed by saying the case had been taken under advisement. The phrase "taken under advisement" has many meanings, and no doubt many descriptions, but the *Weekly Arizona Miner* of July 20, 1877, has provided one of the best: "The last gun is fired, the powder is all burned, but the fortunes of war are yet to be determined."

For the most part, the papers of early Arizona days were not objective in their news reporting and usually editorialized at any given opportunity. Then, too, there were the contemporaries of the day who were always rushing their exploits and remarks into print, being only one step away from our present day method of prepared statements or handouts for news. Even with these items, the papers gave a fairly good idea of current activities. In fact, one of the classics was this item from the *Arizona Citizen* of November 28, 1874, commenting on the selection of a jury for a murder case:

> . . . [P]eople who come under the head of business' ones, seek every pretext to avoid jury duty. Nothwithstanding life and large property interests are at stake, men of much property or business are seldom secured on juries. This nearly always occasions delay and expense, and sometimes works great injustices to parties ligitant. But it is an evil without a remedy, so far as courts and apparently law-matters are concerned.

The interest in the courts and attorneys by the newspapers was very natural, as it is today, since court activity always reflects the current events of the public and government. Newspaper relations with the bar and attorneys generally have always been good, even down to the present day, when one of Tucson's newspapers publishes its editorial against the "closed shop" of the lawyers. This editorial is as regular as the swallows' return to San Juan Capistrano.

C. O. Anderson—attorney, teacher, and newspaperman—supplied this invitation, issued by the Sheriff of Navajo County on November 28, 1899, after Judge Richard E. Sloan had sentenced to death a man who was found guilty of murder:

> You are cordially invited to attend the hanging of one George Smiley, Murderer. His soul will be swung into eternity on December 8, 1899, at 2 o'clock P.M. sharp.
>
> Latest improved methods in the art of scientific strangulation will be employed, and everything possible will be done to make the surroundings cheerful and the execution a success.

In Mohave City, during 1872, an attorney was having difficulty with one of his clients. As a result, the client took an ad in a Tucson paper and denounced his lawyer "as an unmitigated scoundrel, and hold myself personally responsible for this language."[53] The same paper picked up the attack and castigated the lawyer very severely by describing him as "wandering around the streets looking as though he had been driven from a sheep fold or henroost under suspicious circumstances." With this treatment, the lawyer soon left Arizona and traveled to California where he later became a superior court judge.

James Reilly, newspaperman and attorney, during his tenure as district attorney in Yuma, had this to say about his compensation:

> . . . [T]hat no man having any reasonable degree of fitness for any business in life (though not a good lawyer) can give his time and attention to the business of the County for such a miserable pittance, and that anyone who so undertakes will be very apt to neglect the duties of the office, if he do not worse.

Reilly was perhaps the only attorney who ever sued a territorial paper for libel, but after filing the suit he did nothing further, as far as the records indicate. He opened his own paper in competition with the Yuma paper which Reilly felt had treated him so shamelessly. The *Weekly Miner* in Prescott, in referring to Reilly's attempt to fight the Yuma paper, said, "Everybody has always admired the courage of the little bull that tried to butt the locomotive off the bridge, but nobody has the least respect for his judgment."

Reilly called his paper *The Expositor*. He soon moved it to Phoenix, and then sold it and went on to Tombstone where he became very well known in the practice of law.

Even during long periods of time when there was little or no activity going on bar-wise, the papers and other current reports would relate occasional meetings of the bar associations of the various cities and towns. Generally these seemed to be a meeting in court of most of the lawyers in the area who were there either to hold memorial services for a lawyer who had passed on or were gathered together for some special occasion where a court proceeding was the focal point of the meeting.

In the 1890's and the early 1900's, many references are found concerning the Tucson Bar Association, Phoenix Bar Association, the Bar Association of Maricopa County, Pima County Bar Association, etc. It appears, however, that many times the so-called bar associations, which had been so designated more by the spectators rather than by the participants concerned, were a very loose, informal group.

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[53] Arizona Citizen, Jan. 20, 1872.

From the time of statehood until 1924, the only organized bar activities of which any record has been found consisted of the organizational meeting held by the County Attorneys throughout the state. They met at the Arizona Club on January 11, 1915, for their organizational meeting.

History records that there was at least a president of the Arizona State Bar in the years 1916-17, who was Joseph H. Kibbey. During 1916, an attempt was made to reorganize the Bar Association which had existed during territorial days. Notices were sent to all concerned, but only eleven appeared for the meeting in Phoenix. Strange as it may seem, no record has been found as to who the presidents of the Bar Association were from 1913 to 1915, 1917 through 1923, nor for the years 1927 and 1930. Records have been discovered of P. W. O'Sullivan and Gene S. Cunningham having been presidents of the Arizona Bar Association, but as yet the exact years are unkown.[54] The original search for the past presidents of the bar prior to integration was instigated by C. C. Faries, Ed Rice, and James Malott, all of Globe.

The first attorney to settle in Miami was Judge Faries, who later became judge of the Gila County Superior Court. Judge Faries is well known throughout the state, not only for his ability, but for his wit. Originally he came to Arizona as a health-seeker, and intended to settle in Nogales. However, in order to practice he had to go to Phoenix to be sworn in before the supreme court. While there, Judge Fredrick G. Nave talked him into going to Miami to practice since there were no attorneys there. Once while enroute to Phoenix he had to change trains at Maricopa, and while waiting stuck his head into the bar. As he did, a man pointed a .45 at him and said "Partner, we are going to have a drink." Said Faries, "You bet your damn life we are."

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1895-96	W. H. Barnes, Phoenix	1914-15	
1896-97	William Herring, Tucson	1915-16	
1897-98	John C. Herndon, Prescott	1916-17	Joseph H. Kibbey
1898-99	Selim M. Franklin	1917-18	
1899-99	A. C. Baker, Phoenix	1918-19	
1900-01	J. H. Hawkins	1919-20	
1901-02	Frank Cox	1920-21	
1902-03	R. E. Morrison, Prescott	1921-22	
1903-04	Frank H. Herford, Tucson	1922-23	
1904-05	Jerry Millay, Phoenix	1923-24	James R. Malott, Globe
1905-06	M. A. Smith, Tombstone	1924-25	W. R. Chambers, Safford
1906-07	Thomas G. Norris, Prescott	1925-26	Harry E. Pickett, Douglas
1907-08	Walter Bennett, Phoenix	1926-27	
1908-09	John Mason Ross, Prescott	1927-28	James P. Lavin
1909-10	George J. Stoneman, Globe	1928-29	James P. Lavin
1910-11	LeRoy Anderson, Prescott	1929-30	
1911-12	Frederick G. Nave, Globe	1930-31	C. C. Faires, Globe
1912-13	H. B. Wilkinson, Phoenix	1931-32	Tom Richey, Tucson
1913-14		1932-33	James R. Moore, Phoenix

The fact that no record can be found of activities or of presidents of these years, is a strong indication that activity-wise the Bar was absolutely dormant. Our senior members of the Bar who were active at this time seem to draw a complete blank when it comes to naming the men who might have been presidents during this period. Still, their memories of the courts generally—judges, attorneys, and their tactics and stories—are very clear and enjoyable to hear.

Many have told me of a Bar Association meeting held at the old Phoenix Country Club located at North Central and Arizona Canal. The date and year are a total blur. But melding together several versions from highly reputable members would indicate it to be pre-prohibition. Many delightful wines were served, but the high point of the evening came when the very venerable and distinguished judge who was to be the evening's main speaker, was unable to make his way to the platform.

Although the local county bars throughout the state have developed a high degree of service and efficiency towards their members, even to the incorporation of the Maricopa County Bar, the start at statehood was not too promising. Outside of Cochise County, the local activities were exceeded in dormancy only by the state effort.

In 1913 the Superior Court of Cochise County had a local bar made up of forty lawyers. Local rules were printed in pamphlet form and the names of all attorneys were listed along with the rules. At that time the county seat was at Tombstone. Fifteen were practicing in Bisbee, the next largest group listed their residence as Tombstone, and the balance were scattered throughout Cochise County. At that time, a Cochise County Bar Association was organized with John C. Gung'l as chairman. However, after the organizational meeting, it did not hold another meeting for a period of eight years. The idea of the County Bar Association was good but it was almost an impossibility to get all of the lawyers together for a bar meeting until prohibition came along and made bar meetings popular along the border.

In this era, the litigation mainly consisted of criminal cases, a great many mining cases, land contests, and difficulties over homesteading and homestead laws. The negligence and personal injury action as we know it today hardly existed. About the only rules which were binding on practicing attorneys were those of the court, as far as litigation and practice in court itself was concerned. Other than that, there were no limits, and everybody practiced law to suit themselves.

The biggest competitors the lawyers had at that time were the notaries public who were willing to prepare and notarize a deed for the sum of one dollar. This was undercutting considerably the two-and-a-half dollars usually charged by attorneys for this type of service.

After eight years of inactivity, and with the advent of prohibi-

tion in the early 20's, the Cochise County Bar Association began to have annual meetings which were usually held in the offices of Knapp, Boyle & Pickett in Douglas. The business sessions were conducted quickly and efficiently. Then the group would adjourn to Agua Prieta for a social hour. On one occasion, the president of the county bar felt the banquet should be held at the Gadsden Hotel in Douglas. This was done, but an impromptu social hour held prior to the banquet caused this procedure not to be too successful. In subsequent years, the annual meeting was held first, followed by the social hour in Agua Prieta. Because there were no dues in the organization, it usually meant that the president had to pay for the dinner and for at least two portions of refreshments for each member of the bar. This was one case where the office actually sought the man!

Although during this period there again was little or no activity insofar as an organized bar was concerned, nonetheless, the attorneys in the state were again the leaders in instituting and taking the necessary steps to assure that future attorneys would be properly trained and educated to grant better service both to themselves and to the public as a whole. In order to put this plan into effect, arrangements were made to begin the College of Law, which is so much an integral part of the legal life of the State Bar of Arizona and its members today.

A very high percentage of the attorneys now practicing in Arizona and a majority of our superior court judges throughout the state are alumni of the University of Arizona College of Law. The College of Law has always been under the guidance of members of the State Bar of Arizona. The faculty has been well-represented in the State Bar, and all three deans of the College of Law, from its beginning to the present, have been active members of the bar itself.

The law school at the University of Arizona was founded by Samuel M. Fegtley. He joined the faculty in 1915, and from 1916 to 1919 was professor of law and head of the department of law. In 1919 he became Director of the School of Law and held this position until the College of Law was created in 1925, when he was appointed its first dean. Dean Fegtley remained as dean until his retirement in 1938.

Dean Fegtley was followed by J. Byron McCormick who, after a successful tenure as dean, served as President of the University of Arizona. Dr. McCormick had been on the law faculty prior to being appointed dean in 1938. He served as dean until his appointment as President of the University of Arizona in 1947. In 1951, he resigned the position of President of the University of Arizona and is presently a professor of law and also legal adviser to the Board of Regents of the Universities and State College of Arizona. In addition, he has served as State Bar Delegate to the House of Delegates of the American Bar Association.

Dean McCormick was succeeded by the present dean, Dr. John D. Lyons, Jr., the first graduate of the University of Arizona College of Law to become dean. As were his two predecessors, Dean Lyons was a practicing attorney. He was also City Attorney for Tucson and Judge of the Superior Court of Pima County prior to his appointment as Dean of the College of Law.

James R. Malott opened the 1924 Bar Convention at Globe and in his address likened the Bar's resolutions to those of New Year's—always made but never kept. He also reviewed the fact that the bar takes minutes, that they look good when written and then are promptly forgotten. This without doubt described the activities of the proceedings of the 1924 meeting and the general apathy which met the bar officers in attempting to work out programs of benefit to the membership. The Bar had been canvassed the preceding August to see if they had any ideas concerning pending legislation. Very few replies were received.

A committee known as the "Ax Committee" was very active and operated most efficiently in opposing bills to fix compensation of attorneys in suits to collect promissory notes and foreclose mortgages, to reduce the fees paid executors and their attorneys to an unreasonably low figure, to establish a time within which the court must decide submitted cases, and to provide for women jurors. Apparently the bar was opposed to all of these. In addition, a disbarment statute was drown up but failed to pass.

Under the bar's constitution, members of the legal profession whose names appeared on the records of the supreme court in the year 1920 were declared to be members of the association. Dues were $3 per year.

At this time, the only requirements to practice law were: to be 21 years of age, a citizen of the United States of good moral character, and to pass an examination prepared by the Board of Law Examiners. The Bar felt that the examination given could be passed by any applicant even though he had little or no legal education. It was suggested that the requirements proposed by the American Bar Association be accepted, but the majority felt that this was too radical a change to be made in Arizona at this time. In 1924, all that the American Bar Association required of an applicant was that he be a graduate of a high school and have at least one year of law school training and two years in a lawyer's office. This proposal failed to pass when subsequently presented to the legislature.

At the same time a new organization to be known as the American Law Institute was being formed, and the Bar sent Chief Justice McAllister of the Arizona Supreme Court to represent it at the meeting being held at the same time as the American Bar Association convention.

In his welcome to the 1924 Bar Convention at Globe President Ma-

lott said, "We may not be able to display the metropolitan airs of Phoenix and Tucson or to offer the liquid refreshments available at our border cities, but we do hope you will avail yourselves of the opportunity to visit our mining plants and local points of interest."

In attempting to determine where past bar conventions were held, many could not pinpoint a time or place, but almost all enthusiastically described how they enjoyed the conventions held in border cities during prohibition.[55]

And so integration came about.

The organizational meeting was held in the courtroom of the Arizona Supreme Court on September 9, 1933. The Commission which organized the State Bar of Arizona consisted of Judge Henry D. Ross, Chairman; James E. Nelson, Secretary; and Charles A. Carson, Jr., J. L. Gust, and Gerald Jones. At this meeting the Organization Commission created the first Board of Governors for the State Bar of Arizona and then adjourned the meeting to September 15, 1933, at which time the new Board of Governors would be present to take over the operation of the State Bar.

At the time of integration there were 654 attorneys and 22 judges in Arizona.[56] Only 175 of these were members of the old Arizona Bar Association which existed prior to integration. At the time of integration, Arizona became the tenth state in the Union to integrate. Now there are approximately 26 integrated bars in the United States.

At this organizational meeting, committees were appointed with members from different counties with the result "that the committees

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[55] Since integration, the State Bar of Arizona has held its conventions as follows:

1933—Phoenix (organization)
1934—Phoenix
1935—Tucson
1936—Phoenix
1937—Tucson
1938—Prescott
1939—Phoenix
1940—Grand Canyon
1941—Phoenix
1942—Tucson
1943—Phoenix
1944—Phoenix
1945—No convention held (War)
1946—Tucson
1947—Grand Canyon
1948—Chandler
1949—Tucson
1950—Chandler
1951—Chandler
1952—Prescott
1953—Yuma
1954—Tucson
1955—Phoenix
1956—Flagstaff
1957—Prescott
1958—Tucson
1959—Chandler
1960—Chandler

[56] Talking with individuals who practiced in Arizona prior to integration, and reading old minutes of bar meetings, showed integration did not come easily. Many difficulties and disadvantages presented themselves to those who practiced without an organized State Bar to cooperate with them and back them up. When the integration processes were started, they were not universally accepted and a great hue and cry came from those who opposed it. Now it's an accepted thing, and I have yet to hear a current word of dissention. President's Report, State Bar of Arizona, 1958.

never got together and never did anything." An original committee had been appointed eight or ten years previously to draft a bill for the incorporation of the bar. That committee never got together, but one day after the legislature convened, Captain Alexander and James Nelson met and put a bill together in one day. It passed the Senate but died in the House. The same thing occurred at the next session, but on the third try the majority of the committee was from Maricopa County and they drafted a bill and secured its passage through the legislature in one week.

The first Board of Governors consisted of: District 1, E. R. Byers of Williams; District 2, Howard Cornick of Prescott; District 3, J. Verne Pace of Safford; District 4, W. G. Gilmore of Douglas; District 5, Francis M. Hartman of Tucson and Frank J. Duffy of Nogales; District 6, Charles A. Carson, Jr., J. Early Craig, James E. Nelson, and Allan K. Perry, all of Phoenix, and William H. Westover of Yuma.

The new officers were Charles A. Carson, Jr., President; Frank J. Duffy and E. R. Byers, Vice Presidents; James E. Nelson, Secretary; and Allan K. Perry, Treasurer.

First order of business was to appoint a Board of Bar Examiners. The new examiners consisted of Raymond M. Campbell, Gerald Jones, and John L. Gust. The committee was appointed "with instructions . . . to be hard-boiled—very hard boiled." Rules were immediately adopted for admission by examination. It was decided that an applicant must be a resident of Arizona for at least six months prior to taking the bar examination. New Mexico had a year requirement and California three months, so the Board split the difference to make it six months for Arizona.

Next business was the creation of administrative committees.[57] A means was created for proceeding in hearing cases where complaints were made against attorneys. The Board immediately moved to provide that the only pleadings permissible would be the complaint, which was required to be in writing; the notice to show cause; and an answer. Demurrers and motions to strike and motions to make more definite

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[57] In District 1, for Navajo and Apache, the administrative committeemen were W. E. Ferguson, Dodd L. Greer, and John P. Clark. A separate committee was had for Mohave and Coconino made up of F. M. Gold, James E. Babbitt, and Louis L. Wallace.

In District 2, for Yavapai, the committee consisted of P. W. O'Sullivan and Ray Westervelt.

In District 3, for Gila, Graham, and Greenlee, there were on the committee, Samuel H. Morris, Jesse A. Udall, and Frank B. Laine.

In District 4, for Cochise, there were Fred Sutter, W. A. Evans, and J. T. Kingsbury.

In District 5, for Pinal and Pima, there were S. L. Pattee, W. R. Chambers, and E. T. Cusick of Tucson, and Earnest W. McFarland of Florence.

In District 6, for Maricopa and Yuma, there were Lynn Laney, Thomas J. Prescott, and Dudley W. Windes.

and certain were not allowed. The Board moved to cut out all technical objections which could possibly be raised so that they could get right to the meat of the issue. No provision was made for challenges inasmuch as it was felt that any conscientious attorney would get off in the the event he had no business on the committee, and further, "that the first thing you know, the accused would be challenging everybody and would start the proceedings out under a cloud." The Board gave administrative committees the power to stop a case once it felt there wasn't sufficient justification to go on. As of that date there were 180 delinquents on the list who had not paid their required dues to practice law.

It was suggested there be a legislative committee in Phoenix composed of members of the Board to recommend changes to the legislature. It was also suggested that if this were done the legislature would try to appeal it so that it would be better to leave it alone. One member said that he had haunted the legislature out there when it was in session, and he would certainly hate to have to go back there. Another man said the legislature should be watched to see that they didn't slip any crazy rules of practice into the law.

The old Bar Association had a group known as the Committee on the Standards of Practice. This was abandoned by the adoption by the Arizona Bar of the American Bar Association Canons of Ethics. The newly created committees on legal practice of law, one from Pima and one from Maricopa County, immediately got busy, and the committee from Maricopa County entered into a meeting with the Corporate Fiduciaries Association in Phoenix. This was composed of the Valley Bank, the Phoenix National Bank, The Phoenix Savings Bank and Trust Company, the First National Bank of Arizona at Phoenix, the Phoenix Title and Trust Company, and the Arizona Title Guaranty and Trust Company. They agreed on a statement of principles. After meeting, the Bar and Corporate Fiduciary Committees arrived at an agreement subject to approval by the Bar and the Corporate Fiduciary group itself. Part of the agreement had to do with a fee schedule requested by the Corporate Fiduciaries inasmuch as they could then give people a general idea as to what a minimum fee would be when they sent peole to an attorney for work. Minimum fees statewide were discussed but dropped because of the difficulty in trying to fix a fee in Phoenix, and also make it fit, for example, in Safford. It was the concensus of the Board that minimum fees be handled by the local associations rather than by the State Bar itself.

At the same meeting, the Board studied the request for reinstatement by an attorney who had been disbarred, and the request was denied.

The Board requested local administrative committees and the local

bars to consider the advisability of providing minimum fee schedules in their respective communities.

Judge Faries and Judge Lampson requested that the Judges' Association come into the State Bar as a judicial council. Up to this time the superior court judges of the state maintained a kind of loose organization which hardly functioned. It had not met for two years. They wanted a group including the supreme court judges, which would meet at the same time the bar had its annual meetings. The judges felt it would create better fellowship, understanding, and cooperation with the lawyers. It would also help the work of the courts. So it was moved that all judges be invited to form a judicial council as a branch of the work of the Judges of Arizona. A voice asked if that would include federal judges, but it was never answered.[58]

It was suggested that the administrative committees make surveys of unlawful practice in their communities and then report this to the Board of Governors. The State Bar in turn could print literature or write letters to the various non-lawyers who were practicing unlawfully. Thus, it could eliminate without a great deal of difficulty, real estate men, abstractors, and insurance men who were causing all the trouble. Coming from the State Bar, it would be an impersonal matter and these people would probably pay more attention to it.

The May 28, 1933, issue of the *Arizona Daily Star* in Tucson carried a story to the effect that the bill for integration had barely passed "by the skin of its teeth" after ten years of trying. The article quoted a prominent member of the bar who stated that while he favored the act, it was unconstitutional because of a conflict with article XIV, section 2, of the Arizona Constitution prohibiting the creation of corporations by general law. However, the Integration Act withstood the stress of times and even survived an attempt to declare a portion of it unconstitutional.

During the year 1950, the Supreme Court of Arizona handed down a decision in a disciplinary case which had been initiated pursuant to the Integration Act.[59] The respondent, a member of the State Bar, claimed that as far as disciplinary proceedings were concerned the act was in

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[58] The minutes of these meetings were reported by a court reporter, and attached to the minutes are the following:

Appendix A: Rules of the State Bar of Arizona relating to recommendations to the Supreme Court for the admission of attorneys from other jurisdictions.

Appendix B: Rules and Regulations for the Committee on Examinations and Admission to the Bar.

Appendix C: Report of the Committee on Rules and Procedure for the State Bar. (J. Early Craig was the Chairman of this Committee.)

Appendix D: Rules of Procedure, adopted November 4, 1933. (These Rules regulated the operation of administrative committees and how they were to work. Later these were followed by our current Rule 1.)

Appendix E: Statement of Principles with Corporate Fiduciaries Association of Phoenix, Arizona.

[59] *In re* Lewkowitz, 69 Ariz. 347, 213 P.2d 690 (1950).

violation of the Constitution because the title to the act did not embrace the subject matter of the act itself. The title read thusly: "An Act relating to the State Bar, and creating a public corporation to be known as 'The State Bar of Arizona'."[60] In its opinion the court stated:

> With this premise in mind, let us consider whether the title of the State Bar Act is sufficient to have given notice to any person interested therein or affected thereby, during the process of its enactment, that the bill would provide an entirely new procedure for the disciplining, suspension and disbarment of members of the State Bar of Arizona, hereinafter called the Arizona State Bar, based upon such rules and regulations as might be adopted by the board of governors (created by said act), not inconsistent with law; that the Board would be granted powers in said act to provide additional grounds for suspension, disbarment or discipline of its members than those therefore existing under the provisions of law. Is the title sufficient to apprise interested persons reading it that the act contains a provision giving to the board of governors power to appoint administrative committees, vesting said administrative committees and the board of governors with concurrent powers to initiate and conduct investigations, with or without complaint, of all matters relating to the Arizona State Bar, or its affairs, or the practice of law, or the discipline of the members of the Arizona State Bar or any other matter within the jurisdiction of the Arizona State Bar? Does the title indicate in any way that the administrative committee or the board of governors is to be vested with power to take and hear evidence touching matters under investigation, administer oaths, to compel the attendance of witnesses and production of books, papers and documents pertaining to such matters? Or to give said administrative committtees and board of governors summary recourse to the superior courts of the state, to punish as for contempt any person for failure to appear in answer to a subpoena issued by either the board or committee and upon appearance for his failure to conform with the orders and requirements of said board of committee?

After fully reviewing cases from other state and all Arizona authorities which touched on the matter in any way, the court ruled:

> We recognize and fully appreciate the outstanding achievements of the incorporated Arizona State Bar in the state and regret that we are forced to declare the portion of the act relating to disbarment proceedings unconstitutional on the ground that said matter is not germane to the subject of the title or directly or indirectly related thereto and has no natural connection thereto. We therefore hold that sections 32-329, 32-335, 32-337, 32-338, 32-339 and 32-340 are unconstitutional and void.

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[60] Ariz. Sess. Laws 1933, ch. 66, at 251 now embodied in ARIZ. REV. STAT. § 32-201.

The court went on to say that until the State Bar Act is amended the State Bar had full recourse in matters of this type due to the provisions of Sections 32-201 to 32-208 relating to the disciplining of attorneys.

The State Bar of Arizona immediately filed a timely motion for a rehearing under the guidance of Judge Alfred C. Lockwood. The matter for the rehearing was thoroughly prepared by all sides and the court granted the motion because of the far-reaching effect of its decision, plus the fact it was somewhat in doubt as to its correctness.

After a very thorough and exhaustive review of the entire subject, the supreme court reversed itself, and in the second opinion[61] (which was a four to one ruling), the court said:

> Actually the principle of self government is the very essence of an integrated bar and if the provisions relative to admissions and discipline were emasculated it would leave but an empty shell. When considered in this light, we believe the only reasonable conclusion that can be drawn from the title in question by the average legislator and those having an interest in or affected by the legislation proposing integration is that contained in such legislation there would be found such closely allied, relevant and germane provisions as those having to do with disciplinary action. A contrary holding would violate the rule forbidding a strained and narrow construction of titles.

The court ruled that the title of the State Bar Act was sufficient to meet the constitutional requirements.

One of the difficulties in proceeding in the disciplinary cases had been the fact that committees were slow and deliberate in their transactions. This was especially true where the help came from voluntary committees who were doing the work in the various counties. The State Bar had another brush with the supreme court when the supreme court justifiably censored it for delay in hearing and disposing of a disciplinary case. One had been pending for some four or five years before it was finally brought to the supreme court for attention. Prior to the time this case was handed down, the State Bar had already proceeded on its own accord to bring up to date its disciplinary proceedings. So by the time the supreme court's ruling was forthcoming the State Bar had worked out a satisfactory system of keeping tab on its disciplinary cases and keeping them moving at a proper gait.

On another occasion the supreme court had an opportunity to pass on the activities of the State Bar in connection with its Admissions and

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[61] *In re* Lewkowitz, 70 Ariz. 325, 220 P.2d 229 (1950).

Examinations Committee.[62] At that time an applicant had passed the bar examination given by the committee but had been denied admission to practice on the ground that he had failed to establish his good moral character. The court held that although the action of the Committee was not unreasonable or arbitrary in denying this particular applicant admission to the Bar, nevertheless, during the investigation of the applicant "fifty-six letters had been received strongly recommending the applicant as a person or high moral character." The court for this reason overruled the State Bar and admitted the applicant to practice.

And so, under the leadership of twenty-six different presidents, including our current President, Devens Gust, the bar in Arizona has developed successfully and has produced a great deal of interest not only among its own members, but also among the public as a whole. Attempts have been made to re-district the state, for State Bar purposes solely. The newspapers and other press representatives have urged a change in Canon 35, and have actively sought the State Bar's help. The Bar has sued the title companies in the state for illegal practice of law; instituted mid-winter meetings of the membership for committee work; held an annual convention and has sent its president each year since 1950 to the American Bar Convention to represent Arizona; appointed representatives to the American Bar House of Delegates; opened its first central office at Phoenix in 1948, with Mrs. Doris Odom in charge; in 1954, employed Don E. Phillips as its first full time executive secretary; aided in staging the American Bar's Pacific Southwest Regional Meeting held in Phoenix; instituted a News Bulletin for members; and created a series of informative legal columns which have been carried in most of the state's newspapers. These items are just a few of the many activities carried on by the membership as a whole and its officers.

The presidents of the Bar since integration have been:

1933-1934—Charles A. Carson, Jr., Phoenix
1934-1935—Charles A. Carson, Jr., Phoenix
1935-1936—W. G. Gilmore, Phoenix.
1936-1937—William H. Westover, Yuma
1937-1938—Henry H. Miller, Phoenix
1938-1939—Francis Hartman, Tucson
1939-1940—C. B. Wilson, Flagstaff
1940-1941—L. L. Howe, Phoenix
1941-1942—John C. Haynes, Tucson
1942-1943—Alfred B. Carr, Phoenix
1943-1944—Matt S. Walton, Phoenix
1944-1945—T. J. Byrne, Prescott

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[62] Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957).

1945-1946—B. G. Thompson, Tucson
1946-1947—Orinn C. Compton, Flagstaff
1947-1948—Stanley A. Jerman, Phoenix
1948-1949—Ralph W. Bilby, Tucson
1949-1950—Anthony T. Deddens, Bisbee
1950-1951—Charles L. Strouss, Phoenix
1951-1952—Walter E. Craig, Phoenix
1952-1953—E. C. Locklear, Prescott
1953-1954—Clifford R. McFall, Tucson
1954-1955—Arthur M. Davis, Phoenix
1955-1956—James B. Rolle, Jr., Yuma
1956-1957—Keith F. Quail, Prescott
1957-1958—James M. Murphy, Tucson
1958-1959—C. A. Carson III, Phoenix
1959-1960—Devens Gust, Phoenix

At the time the Bar Act was passed by the State Legislature, the six districts were set up in as equitable a manner as could be evolved; but as time went on, dissatisfaction became apparent among certain counties which felt that they were not receiving proper representation on the Board of Governors.[63]

Most of the dissatisfaction came from Pinal and Santa Cruz Counties for the reason that, being in one district with Pima County, the two smaller counties were never able to secure sufficient votes to elect one of their own to the Board of Governors. Pima County always overwhelmingly placed their own members in the two positions on the Board provided for this particular district. This problem was never felt in District 6 (Maricopa and Yuma) with its five representatives on the Board, since the statute provided that one of the five must come from Yuma County.

So, in an attempt to correct this point, the Board of Governors appointed a committee to get busy and see what could be done. As the matter then stood, the northern tier of counties had a total of thirty-three attorneys in District 1, and had one member representing them on the Board of Governors. It was recommended that this district remain as it was.

Next came Yavapai County with twenty-three attorneys in District

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[63] District 1—Mohave, Coconino, Navajo, and Apache Counties
District 2—Yavapai County
District 3—Gila, Graham, and Greenlee Counties
District 4—Cochise County
District 5—Pima, Pinal, and Santa Cruz Counties
District 6—Maricopa and Yuma Counties

2 and one representative on the Board. The recommendation was that this district be enlarged to include Yuma County, with two representatives on the Board, one coming from each county. District 3 (Gila, Graham, and Greenlee—the three G's) with twenty-six attorneys, would be expanded to include Pinal County, giving this district a total of fifty-one attorneys with one representative.

Cochise County stood alone with twenty-two attorneys and one representative. This district was to be enlarged to include Santa Cruz County, making a total of twenty-nine attorneys with one representative. This then would mean that Pima County would stand alone in its district with two representatives, and that Maricopa would stand alone with four representatives. All of these recommendations were made to the Board of Governors, but in 1956 they were all turned down by the Board.

The following Spring at the annual convention at Prescott, Pinal County very strongly urged that the matter of redistricting be taken up again and requested that the convention itself direct the Board to take further action. The Board was directed to appoint a new committee to consider redistricting with one member from each county on the committee. The argument carried over to the Tucson convention in 1958, after a series of meetings held during the year, again with Pinal leading the demand for better representation. Cochise County very strongly opposed any move placing another county in its district. But the redistricting plan failed to pass at this convention, and approximately four years of work and effort in this regard ended.

At the 1954 convention held in Tucson, a resolution was passed by the assembled convention directing that the State Bar of Arizona file suit against the title companies because of their illegal practice of law. In due time, the suit was filed in Prescott, later removed to Phoenix, and tried. The lower court held against the State Bar and an appeal is now pending in the Arizona Supreme Court.

The history of the Bar and its members in Arizona is being made daily. Too, much remains to be assembled of the past from all kinds and types of sources—old court records, the memories of our senior members, records in various law offices throughout the state, newspapers, suggested sources which this small effort may bring to mind, letters, books, historical manuscripts, and the excellent files of the Arizona Pioneers Historical Society.

And so began the life of the State Bar of Arizona. Twenty-five years later the organization was going strong and celebrated its twenty-fifth anniversary as an integrated bar. The theme of the convention held in Tucson on April 10, 11, 12, 1958, was the silver anniversary at which the past presidents were honored as well as all members of the bar who had

practiced law in Arizona for forty years or more.[64] This was the largest turnout ever had for an Arizona Bar Convention, and the allotted time was comfortably filled with business, educational, and social activities.

It was at this time that the bar was able to look back on its past record, not with complacency, but with satisfaction as to the effort made, and as to the effort necessary to meet the demands of the future.

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[64] Those honored were:

1897
Henry F. Ashurst
Charles Woolf

1898
Joseph E. Morrison

1900
J. H. Langston

1906
Barnett E. Marks
R. C. Stanford

1907
Ben C. Hill
Carl G. Krook
D. M. Penny

1909
John C. Gung'l
Gerald Jones
G. W. Shute
Leslie C. Hardy

1910
Frank J. Barry
Clifford C. Faires
Bertram L. Hitch
Joseph H. Morgan
Edward W. Rice
Frederick A. Shaffer
C. B. Wilson

1911
Fred L. Ingraham
Harry Johnson
J. H. Moeur
George F. Senner
Fred Blair Townsend

1912
Alice M. Birdsall
William E. Brooks
R. H. Brumback
Joseph S. Jenckes
L. M. Laney
Ed M. Whitaker
Lee O. Woolery

1913
H. H. Baker
Neil C. Clark
Fred J. Elliott
Dave W. Ling
M. C. Little
A. Y. Moore
Samuel H. Morris
M. T. Phelps
Floyd M. Stahl

1914
F. M. Gold
Leon S. Jacobs
Henry C. Kelly

1915
James P. Boyle
R. William Kramer
George W. Nilsson
James R. Malott
R. G. Langmade
Stephen B. Rayburn
Clifton Mathews
Louis B. Whitney
Dudley W. Windes

1916
Duane Bird
James Blacksill
John C. Haynes
Perry M. Ling
V. P. Lucas
Greig E. Scott
Jesse C. Wanslee

1917
Raymond Allee
Earl Anderson
Ralph W. Bilby
Minor Blythe
W. E. Ferguson
Oswald C. Ludwig
Clifford R. McFall
A. Henderson Stockton

Comments

WHEN IS A PAYEE AN "IMPOSTOR"?

RALPH. W. AIGLER

The devices by which crooks endeavor to separate victims from their goods or money are many and varied. When a negotiable instrument is used in the process, most commonly the method is (a) forgery, (b) impersonation, or (c) a fictitious name. Partly because in practice these may overlap, it may be confusing as to which type a case presents.

Forgery, like its close relative, counterfeiting, is often imitative.[1] The signature, the most common instance of forgery, is normally made to look like the signature of the person named. In forgeries the ultimate victim, if the fraud is successful, is most often a third party; a person will usually recognize the ungenuineness of his own purported signature. That the signature on a note or check is not genuine may not be recognized by a purchaser or the drawee, as the case may be. On presentment of a note, presumably the maker will recognize the fraud and the purchaser-presenter may be left with the loss. If the forged check gets by the drawee and is charged to the account of the apparent drawer, the fraud will be discovered when the drawer looks over his canceled vouchers and the drawee will then probably have to recredit the account of its depositor. Under the generally accepted doctrine of *Price v. Neal*[2] the bank will most likely not be able to shift its loss onto the presenter. See, however, note 6 *infra*.

Impersonation implies the presence of an impostor. Here the pretense is of another personality, not, as in forgery, the pretense of a signature by another. Henry Richmond, for example, induces *X* to think that he is dealing with Thomas Rich, a reputable person of means. In that belief *X* issues a check on *A* Bank payable to the order of Rich, the check being delivered to Richmond. Here Richmond is an impostor and *X* has been deceived.

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[1] The element of imitation must not be overstressed. That there may be forgeries without even an attempt at imitation is clear. For example, a check payable to the order of a named payee may be lost by him and then found by X who negotiates it by endorsing the payee's name. Though X may never have seen a genuine signature of the payee and therefore cannot possibly imitate it, he is nevertheless a forger. Then, too, forgery may be committed independently of a signature, as by altering the body of the instrument. The essence of forgery, without attempting a definition, is the signing without authority of the name of another.

[2] 3 Burr. 1354 (1762). The doctrine of this early case is usually considered to have been preserved by section 62 of the Negotiable Instrument Law.

Richmond then in his character as Rich presents the check to *A* Bank which, believing the presenter actually is Rich, as was true of *X* when he issued the check to the impostor, pays the amount called for and charges the payment to *X's* account. When the latter learns what has happened, he quite naturally is inclined to insist that the bank paid to the wrong party and should therefore bear the loss.

The question has been before many courts. While there is some authority supporting *X's* position,[3] the cases most commonly go the other way.[4] The basic question is: To whom did *X* order the money paid? To the person whose name appeared as payee? Or to the person to whom the check was given, the one who was believed by *X* to be Rich?[5] If *X's* check is deemed an order that the money be paid to Rich, then it follows that any endorsement by Richmond is a forgery and the bank, whether or not there was an endorsement, has paid to the wrong party, and an endorsee claiming through such endorsement acquires no ownership in the instrument.[6]

In the view, then, that the true payee is the person whose name appears on the check, the impostor situation truly presents a question of forgery.[7] If, however, the drawer's order to his bank is deemed to be a direction to pay to the person to whom the check was given, there is no forgery when the impostor endorses in the name he has assumed. In so far as the opinion of the Ninth Circuit in the case which prompts this discussion (see note 9 *infra*) implies that if a factual situation is deemed to present an impostor problem, the possibility of forgery is thereby excluded, would seem to be going too far.

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[3] The outstanding case is Tolman v. American Nat'l Bank, 22 R.I. 462, 48 Atl. 480, 52 L.R.A. 877, 84 Am. St. Rep. 850 (1901). See [1940] WIS. L. REV. 161, approving the case.

[4] Among the many cases see Santa Maria v. Industrial City Bank, 326 Mass. 440, 95 N.E. 2d 176 (1950); Russell v. Second Nat'l Bank, 136 N.J.L. 270, 55 A.2d 211 (1947), discussed in 46 MICH. L. REV. 787.

[5] When Richmond in this hypothetical case presents the check to the teller of the drawee bank one may imagine the latter as having some doubts as to whether Richmond really is Rich; he goes to the telephone and asks *X* to describe the person to whom he had given the check. Certainly, *X's* description would not be Rich. So when the teller pays over the money it seems reasonably clear that it goes to the very person the drawer meant should get it. This approach makes one wonder whether the Commercial Code is on sound ground in treating transactions by mail, etc. as on the same basis as those that are face to face. See in this connection the *Russell* case, *supra* note 4, and Cohen v. Lincoln Sav. Bank, 275 N.Y. 399, 10 N.E. 2d 457, indicating that even face to face dealings may not produce the result, because too fleeting.

[6] Which means, further, that when payments to the presenter are made under such mistake, the money so paid may be recovered, unlike the situation referred to in note 2 *supra*.

[7] It is confusing to treat questions arising out of signatures of impostors as entirely removed from the forgery area. One may have instances of impersonation which under the applicable law develop into forgeries. In Atlantic Nat'l Bank v. United States, 250 F.2d 114, Brown, J., uses language indicating a nation that the two areas are mutually exclusive. This case is noted in 32 TUL. L. REV. 755, collecting many citations. See also 11 OKLA. L. REV. 433.

Along with these two types of situations, imitation of signature and impersonation, there is a third which superficially may look like one or both of the first two. This third one is not truly an instance of imitation or of impersonation; rather it is the use of a nom de plume or pseudonym. A simple illustration will suffice: One Loveland, using for the occasion the name Pulver, makes out invoices of goods supposedly furnished to *X* Company. A confederate in the office of the company approves the invoices for payment by the treasurer. The latter, with authority to issue company checks, makes out checks payable to the order of Pulver and they are delivered to Loveland, perhaps by mail. By Loveland, using the name Pulver, the checks are endorsed and cashed by *D* Bank which in turn presents them to the drawee and collects the money called for.

Here it is quite clear that the money was paid by the drawee in accordance with its depositor's orders. In other words, the payment, though of course induced by a fraud, went to the very party the drawer intended, namely a person identified by the name of "Pulver" for the purpose of that transaction, who was really Loveland. The endorsement made actually by the latter was not a forgery of Pulver's signature—Loveland was for the time being a person named Pulver. Nor was Loveland an impostor any more than an essayist who publishes under an assumed name is an impostor.

It is, of course, true that if Loveland were an impostor, in that he *pretended* to *be* a real *person* by the name of Pulver, some courts might look upon the endorsements to *D* Bank as a forgery, thus imposing liability upon that bank. But as pointed out above, most courts viewing the situation as involving an impostor would not find a forgery, hence no liability on *D* Bank. Thus viewed as an impostor case, authorities might conflict. But viewed as it should be, as a use of a nom de plume, the result should be clear.[8]

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[8] An interesting case presenting such a fact situation is Hartford Acc. & Ind. Co. v. Middletown Nat'l Bank, 126 Conn. 179, 10 A.2d 604 (1939). The court said, inter alia, that "The endorsement of a check by the person to whom it was actually issued and by whom the drawer intended that the money should be received, is not a forgery although that person was acting under an assumed and fictituious name, especially when he is not really impersonating another individual."

Along with this Connecticut case consideration should be given to Hartford v. Greenwich Bank, 157 App. Div. 448, 142 N.Y.S. 387, 215 N.Y. 726, 109 N.E. 1077. In the *Hartford* case *R*, a crook, was in the service of *P*. Pretending he was *W*, he set up an office, procured stationery, etc. In his character as *W* he purported to sell goods to *P;* in his character as *R* he approved for payment bills rendered by himself as *W*. Checks on the bank were then made out by *P* to the order of *W*, the checks being executed by another, an authorized member of *P's* staff. *R*, acting as *W*, endorsed these checks and collected the money from the bank. When the fraud was discovered and the bank had refused to recredit *P's* account the latter sued the former. It was held that the payments were in accordance with *P's* orders. In a later case the New York court has repudiated the decision. See Ullman Co. v. Trust Co., 257 N.Y. 563, 178 N.E. 796.

The overruling of the *Hartford* case was in a *per curiam* opinion of twelve lines,

These observations are prompted by a recent case decided by the Ninth Circuit Court of Appeals. The crook in that case sought to defraud the United States by a device quite like that used by Loveland in the hypothetical case above. In the actual case phony income tax returns in the names of imaginary persons were used instead of phony invoices as used by Loveland. These tax returns were made up in such way as to call for issuance of refund checks made payable to the phony persons whose names had been used. These checks were endorsed in those names by the crook and cashed by banks, acting in good faith.

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it being said that the *Hartford* decision was "so inconsistent in principle" with Strang v. Westchester County Nat'l Bank, 235 N.Y. 68, 138 N.E. 739, and United Cigar Stores Co. v. American Raw Silk Co. 184 App. Div. 217, 171 N.Y.S. 480, 229 N.Y. 532, 129 N.E. 904.

It is just possible that the court was a bit hasty in declaring that the *Hartford* case was overruled. It is true that Cardozo, J., in the *Strang* case, said that *Hartford* was "a case which later opinions have said is not to be extended." One of the two cases cited by him in this connection was the *Raw Silk* case. The other was National Sur. Co. v. National City Bank, 184 App. Div. 771, 172 N.Y.S. 413.

In the *Raw Silk* case a crook calling himself Peterson, but pretending to represent one Lieut. Parks, persuaded defendant to issue a check as a contribution to a tuberculosis fund naming Parks as payee. The crook then endorsed the check in the name of Parks. The court concluded, surely rightly, that such endorsement was a forgery—defendant had no idea that Parks was not an actual person. The case would seem to be utterly unlike that of *Hartford*. The court declared the two cases were distinguishable.

The *National Surety* case, *supra*, involved facts more like the *Hartford* case, in that the crook, an employee, doctored a payroll so as to make it appear that the employer owed various persons. The Appellate Division concluded that the endorsements made by the crook in the names of the pretended employes were forgeries. It is significant, however, that the court pointed out: "He [the crook] had not assumed that name. Therefore, the maker being ignorant of the fact that the name of the payee was fictitious, and the check not having come into the possession or been endorsed by the person, *or any one assuming to be the person intended* [italics added], the maker was not liable."

In the *Strang* case where Cardozo used the language quoted above, a draft was endorsed to one Remsen, who had been represented by Bushnell, an attorney, as being the owner of certain property, whereas in truth Bushnell himself was the owner. The latter, using the name Remsen, then made the endorsement in question. In concluding that this latter endorsement was ineffective the court was deciding a case wholly unlike the *Hartford* case. Cardozo pointed out that the belief of the endorser that Remsen was the owner "did not mean that some one else who had been expressly excluded as a borrower had the right, because he was the owner, to step into the borrower's shos."

Of course it is to be noted that *R* in the *Hartford* case was an employee of the drawer of the checks. In the Connecticut case the crook was not on the drawer's staff. Whether a distinction can be drawn between the two situations on the basis of that difference in the facts may be questioned. At any rate it can probably be urged that in the New York situation the drawer's "intention" was not to pay for phony goods, supposedly furnished by a phony supplier who actually was its own employee!

Let us imagine a fantastic case! Suppose Dana Latham, the Commissioner of Internal Revenue, were to prepare and send in a series of income tax returns in names he had, so to speak, picked out of the air, the returns showing apparently sound claims for refunds. If the refund checks got into the hands of Latham (as they got into the hands of the crook in the recent case) and he endorsed them in the names he had selected, it might be that a court, considering that Latham was about the last person in the world intended by the issuer as the payee, would conclude that the documents were forgeries! In a somewhat different degree that was about what happened in the *Hartford* case in New York.

When the fraud was discovered, the United States sued the banks to get back the money collected by them from the Treasury. The court's conclusion denying recovery, seems wholly sound. But the reasoning—treating the situation as involving an impostor—seems more than dubious.[9]

As in the Connecticut case cited in note 8, the checks issued as supposed refunds went to the very person who, whatever name or names he used, was intended to get the refunds—the crook was not *impersonating* another person. What he did was to call himself by a name or names not his own, and the Government dealt with *him* by those names.

In its opinion the Court of Appeals states categorically: "As above indicated, we think we have here true impostor cases."[10] The court was obviously led to this position by the language used by Brown, J., in *Atlantic Nat'l Bank v. U.S.*, 250 F.2d 114, writing for the Court of Appeals for the Fifth Circuit in a case with facts virtually identical with those in the recent case. Counsel in this case should have impressed upon the court that the Fifth Circuit was right in its conclusion but wrong in treating the facts as an impostor situation.

Impersonation (by impostors) overlaps assumption of name (pseudonym) in the sense that in each the defrauder uses the name of another. The "impostor" picks the name of an actual person with whose qualities, particularly economic, the victim is presumably acquainted. The impostor's plan is to gain an advantage by pretending to be that other person. The defrauder who merely assumes another name for the transaction picks the name or names, so to speak, out of the air. Though the name he selects may be truly borne by some actual person somewhere, he has no idea that to the victim the selected name carries any more weight than would any other; in short, he is not *impersonating* someone, he is merely identifying himself by the chosen name.

In these instances of impersonation and particularly in those in which an assumer name is used, one's mind may turn to the problem of fictitious payees. It is, of course, well known that a negotiable instrument payable to the order of a fictitious payee may be payable to bearer, so the question of effectiveness of the endorsment does not arise. It must, however, be remembered that the result of being payable to bearer is reached only when it is *known* to the party making the instrument so payable that the named payee is non-existent or fictitious.[11]

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[9] United States v. Bank of America and United States v. Security-First Nat'l Bank, 274 F.2d 366, decided Dec. 28, 1959, by the Ninth Circuit.

[10] The danger is that other judges and the bar may be led astray into thinking that forgeries may not be found even in impostor situations. As pointed out above, respectable authority may be adduced that in the true impostor cases forgeries may be found.

[11] The term "fictitious" as used in this connection includes actual persons, if they are intended not to have or take any interest under the instrument.

CASES WHICH THE SUPREME COURT OF ARIZONA SHOULD REVISIT

(Family Purpose Doctrine)

CHESTER H. SMITH*

The Supreme Court of Arizona should revisit and re-analyze its position on the "family car" or "family purpose" doctrine as set forth in the following three cases: *Benton v. Regeser,*[1] *Donn v. Kunz,*[2] and *Mortensen v. Knight.*[3]

Facts

In the *Benton* case the court said this:

> The cases cited firmly establish the rule that a father who furnishes an automobile for the pleasure and convenience of the members of his family makes the use of the machine for the above purposes his affair or business, and that any member of the family driving the machine with the father's consent, either express or implied, is the father's agent. We are convinced that the rule is based on sound reason and that it is supported by the great weight of authority, and therefore shall adopt it as the rule in this jurisdiction.

In the *Donn* case the court quoted the above statement from the *Benton* case with approval and said, "It is not disputed that the 'family car' doctrine is the established law of the state of Arizona." However, in the *Donn* case the court limited the application of the doctrine to the common law head of the household and refused to extend its application to the community-owned car.

In the *Mortensen* case the court refused to limit the application of the doctrine as set forth in the *Donn* case and extended its application to the community-owned car. The court said, "It is, therefore, our conclusion that the family purpose doctrine applies to impose liability even though the automobile is community property, for the control and management is fixed by statute exclusively in the husband."

Analysis

Three case should be carefully distinguished. (1) If the owner of the car furnishes it to another person who is in fact and in law the owner's agent or servant, then of course, the owner is liable in damages under the familiar doctrine, respondeat superior. With that there can be

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* See Contributors' Section, p. 86, for biographical data.

[1] 20 Ariz. 273, 179 Pac. 966 (1919).

[2] 52 Ariz. 219, 79 P.2d 965 (1938).

[3] 81 Ariz. 325, 305 P.2d 463 (1956).

no quarrel. (2) If the owner of the car furnishes it to another person who is known by the owner to be a careless driver then the owner should be liable in damages if such other person continues his negligent driving and injures some third person. (3) If the owner of the car furnishes it or lends it to another person, and that other person uses that car "on a frolic of his own," in fact wholly divorced or apart from the business of the owner, then, under the ordinary law of master and servant or principal and agent, the owner of the car is not liable for damages caused by the user of the car. Their relationship is that of bailor and bailee and the bailor is not liable for the damages caused by the negligent use of the bailed res by the bailee except as set forth under (2) next above.

It is this third case which is beyond the usual law of agency and is included within the "family purpose" or "family car" doctrine. For a master or principal to be liable for the acts of his servant or agent the act must be (a) within the scope of the employment or agency AND (b) in furtherance of the business of the master or principal. Assume the following facts. *F* is the father and head of the household. He has a son, S, who is 18 years of age. S has a girl friend, *G*, who, in *F's* opinion, is an evil influence in *S's* life. S and *G* frequent dance halls which are also an evil influence on S. On a given evening when S is far behind in his "homework" he asks *F's* permission to take *G* to a dance. *F* gives his consent most reluctantly and in a kindly manner advises S of his duties and errors. S takes the car and drives negligently, causing injury to *P* who sues *F* and S for damages. For the court to take the view that *F* has made S his servant or agent while on this "frolic of his own" is simply contrary to fact; and for the court to say S is furthering the "business" of *F* is still worse. Further, to construe *F's* "business" as including the use by S of *F's* car for *S's* frolic is to give the word a meaning which only the judge would recognize. The truth is this. *F* is the bailor of the car and S is a bailee thereof. At common law a bailor is not liable for the bailee's negligent use of the bailed res. If *F* had loaned his car to *X* who is not a member of *F's* household and *X* had driven the car negligently, *F* would not be liable. Had *F* loaned his rifle or his knife to his son, S, and S had used either negligently resulting in injury to *P*, the father, *F*, would not be liable.

The vice of the "family car doctrine" is not so much that it holds *F* liable for *S's* negligent use of *F's* car, if such be socially desirable as some cases say, but lies in the fact that it selects the "head of the household" of all the types of bailors, and selects a "car" among all the possible items which may be bailed, and makes him and him alone among such bailors liable. It lies in the inequality and discrimination which the law recognizes against that person who happens to be the "head of the household." It singles him out to carry the burden of damages when all

other bailors would go scot free, including other bailors of cars. The doctrine will not stand the light of analysis.

That the Arizona Supreme Court has espoused the doctrine in clear and unambiguous languge cannot be doubted as appears in the quotations above. But it is by no means clear that each of the above mentioned Arizona cases could not have been solved under the general doctrine of respondeat superior. It may serve no useful purpose as against the clear and express language of the court to distinguish dicta from holding. It is enough to say that the court has embraced the doctrine as "sound."

Conclusion

The Supreme Court of Arizona should repudiate the "family car" or "family purpose" doctrine on two grounds. (1) It is unsound as a legal proposition. (2) The liability imposed by the doctrine is one which should be created by the legislature, not by the courts.

If it is conceived to be desirable that a "head of a household" be liable for the negligent use of the family car, it would seem to be equally desirable that every other car owner who lends his car to another should be held liable for the borrower's negligent driving of said vehicle. With that premise let the legislature of Arizona enact an appropriate statute to that effect has have the legislatures of other states.[4]

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[4] See Note, 14 TEX. L. REV. 234, 236 (1936), listing Arizona among 18 states which follow the doctrine and p. 241 listing 26 states in which the doctrine is not followed; RESTATEMENT (SECOND), AGENCY § 238, comment *c* (1958), saying, "A child can pursue his own private affairs as distinguished from the business of his parent, and if in such case he is using the family automobile by permission of his father, he is in a position of a bailee rather than of a servant." A typical statute appears in the Iowa case of Secured Finance Company v. Chicago, Rock Island, & Pacific Railway Company, 207 Iowa 1105, 224 N.W. 88, 61 A.L.R. 855 (1929), which reads as follows: "In all cases where damage is done by any car driven by any person under fifteen years of age and in all cases where damage is done by the car, driven by consent of the owner, by reason of negligence of the driver, the owner of the car shall be liable for such damage." See also 8 N. CAR. L. REV. 256 (1930); 21 KY. L.J. 483 (1933) and 100 A.L.R. 1021 (1936).

ARIZONA
LAW REVIEW

CONTRIBUTORS' SECTION

RALPH W. AIGLER, Professor of Law, University of Arizona. LL.B. 1907, University of Michigan; author, CASES ON NEGOTIABLE PAPER AND BANKING (1937); CASES ON BILLS AND NOTES (1955); co-author, CASES ON BANKRUPTCY (1939); CASES ON PROPERTY (1960).

RAY JAY DAVIS, Associate Professor of Law, University of Arizona. B.A. 1948, Idaho State College; LL.B. 1953, Harvard University; LL.M. 1956, Columbia University; member of the Idaho Bar.

JAMES M. MURPHY, member Conner, Jones and Murphy, Tucson, Arizona. B.S. 1938, University of Notre Dame; LL.B. 1941, University of Arizona; member State Bar of Arizona; President of the State Bar of Arizona, 1957-58; member House of Delegates, American Bar Association; Lecturer (part-time) College of Business and Public Administration, University of Arizona.

CHESTER H. SMITH, Professor of Law, University of Arizona. B.A. 1920, LL.B. 1921, University of South Dakota; S.J.D. 1924, Harvard University; member of Arizona, Iowa, Montana and South Dakota Bars; author, HOW TO ANSWER LAW EXAMINATIONS (1946); SURVEY OF TRUSTS (1949); SURVEY OF REAL PROPERTY (1956); Smith Review Series.

SUMMARY OF 1959 ARIZONA CASE LAW

ADMINISTRATIVE LAW AND PROCEDURE

Delegation of Power.—State v. Wacker[1] presented the court with the question of whether there had been a constitutional delegation of power to the Commission of Agriculture and Horticulture to formulate crop regulations. The court repeated the usual "adequate standards" formula[2] and held the delegation of legislative power and authority constitutional. The transfer of law-making power was also upheld in *Killingsworth v. West Way Motors, Inc.*[3]

Administrative power to impose taxes is generally treated as a special area of the delegation problem.[4] This issue was posed in *Climate Control, Inc. v. Hill*[5] in relation to the clause of the self-rating statute empowering the Industrial Commission to provide for a carrying charge, a "premium tax," and a rate for creation of reserves.[6] The supreme court held the clause *void* as an unconstitutional attempt to delegate taxing power since it was impossible to relate the words "premium tax" with certainty to any portion of the workmens compensation act. In so holding reference was made to a previous case which stated that an act imposing a tax must be certain, clear, and unambiguous.[7]

In contrast with the *Climate Control case*[8] in *Switzer v. City of Phoenix*[9] the doctrine of non-delegability was not imposed. A Phoenix ordinance authorized issuance of street improvement bonds, principal and interest of which was to be paid from gasoline tax receipts collected by the state and distributed to the city. Since the legislature permitted use of the tax for retirement of such bonds, there was a question whether it had unconstitutionally contracted away to a city the power to impose a tax.[10] The court held that the legislature had merely imposed a tax and applied the proceeds to a particular purpose.

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[1] 86 Ariz. 247, 344 P.2d 1004, 1 ARIZ. L. REV. 329 (1959); see also *Constitutional Law.*

[2] See *Administrative Law and Procedure, Survey of 1958 Ariz. Case Law,* 1 ARIZ. L. REV. 119 (1959); 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 2.11 (1958).

[3] 347 P.2d 1098 (Ariz. 1959); see also *Constitutional Law.* Some of the rules and regulation made under such authority were held unconstitutional.

[4] See GELLHORN & BYSE, ADMINISTRATIVE LAW 145 (1954).

[5] 86 Ariz. 180, 342 P.2d 854 (1959); see also *Evidence, Workmens Compensation.*

[6] ARIZ. REV. STAT. § 23-983(E) (1956).

[7] Dunhame v. State Tax Comm'n, 65 Ariz. 268, 179 P.2d 252 (1947).

[8] Climate Control, Inc. v. Hill, *supra* note 5.

[9] 86 Ariz. 121, 341 P.2d 427 (1959); see also *Constitutional Law, Municipal Corporations.*

[10] The state constitution explicity prohibits the legislature from contracting away its taxing power. ARIZ. CONST., Art. 9 § 1.

Filing of Regulations.—During 1959 the supreme court for the first time invoked the filing provisions of the Arizona Administrative Procedure Act[11] to strike down a regulation. In *State v. Wacker*[12] an agriculture and horticulture rule was held invalid since a "certified copy" of it was not on file with the secretary of state as required by the act.

Administrative Evidence.—It has previously been determined that the Industrial Commission is under no duty to procure and pay for expert medical testimony on behalf of a claimant.[13] This position was reaffirmed by the court in *Cain v. Industrial Comm'n.*[14]

In issuing certificates of convenience and necessity the decision of the Corporation Commission must rest on facts existing prior to hearing and order. This principle was applied in *Corp. Comm'n v. Gibbons*[15] where plaintiff sought cancellation of a similar certificate issued one day after plaintiff's. The order of the commission which denied the application for cancellation was sustained since there was no evidence that plaintiff was serving the territory when the hearings were held.

In *Allen v. Industrial Comm'n*[16] the commission determined that the petitioner was not entitled to permanent compensation on the ground that he had not suffered any loss of earning capacity. The court, in setting aside the order, held that the award of the commission denying permanent compensation was not supported by "competent evidence." In so holding the court seems to indicate that Arizona follows the residuum rule,[17] a rule whereby state courts have declared that an administrative finding must be supported by a residuum of legal or competent evidence; however this is questionable since the court, in the past, has held that the award must stand if there is "substantial evidence" to sustain findings of the commission.[18]

Records.—A failure by the Corporation Commission to make and

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[11] ARIZ. REV. STAT. §§ 41-1001 to -1008 (1956).
[12] State v. Wacker, *supra* note 1. This aspect of the case was noted at 1 ARIZ. L. REV. 329 (1959).
[13] Egelston v. Industrial Comm'n, 52 Ariz. 276, 80 P.2d 689 (1938); Bochat v. Prescott Lumber Co., 51 Ariz. 97, 74 P.2d 575 (1937).
[14] 347 P.2d 699 (Ariz. 1959); see also *Workmen's Compensation.*
[15] 86 Ariz. 210, 344 P.2d 167 (1959).
[16] 347 P.2d 710 (Ariz. 1959); see also *Workmen's Compensation.*
[17] See 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 14.12 (1958).
[18] Stanley v. Industrial Comm'n, 75 Ariz. 31, 251 P.2d 638 (1952); Urvalejo v. Industrial Comm'n, 72 Ariz. 43, 230 P.2d 516 (1951). See also text at notes 34, 35, 36, *infra.*

retain a complete record of a hearing as required by statute[19] will render its order based thereon invalid and of no effect. This was demonstrated in *Walker v. De Concini*[20] where the commission failed to hear the evidence at an application hearing and also failed to have a transcript of such hearing made. A similar ruling was entered in *Dallas v. Corp. Comm'n.*[21]

Notice.—A failure by the zoning commission and county board of supervisors in *Hart v. Bayless Inv. & Trading Co.*[22] to comply with the notice and hearing conditions of the Zoning Act[23] resulted in a lack of jurisdiction to adopt certain zoning ordinances.

Method of Review.—During 1959 a variety of methods was employed to obtain judicial consideration of agency actions. For example, mandamus was held appropriate to coerce administrative action in *Long v. Dick*[24] and *Bianco v. Hess;*[25] certiorari was sought in the *Dallas case,*[26] and declaratory judgment in the *Bianco*[27] and *Walker*[28] cases. But it was in *Knape v. Brown*[29] that the court added to Arizona law on method of judicial review. There the plaintiff sought review of action of the Board of Beauty Culturist Examiners under provisions of the Administrative Review Act.[30] The court held that the action of the board was not subject to such review since a section of the Beauty Culture Act[31] provided a remedy of review for refusal of the board to give a license to an applicant who had failed to make a passing grade. This action by the court materially reduced the potential impact of the Administrative Review Act. However, judicial review under the Adiministrative Review Act was successfully exercised in *Foote v. Gerber*[32] since the Fruit and Vegetable

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19 ARIZ. REV. STAT. § 40-615 (1956).
20 86 Ariz. 143, 341 P.2d 933 (1959).
21 346 P.2d 152 (Ariz. 1959); see also *Courts and Civil Procedure.*
22 346 P.2d 1101 (Ariz. 1959); see also *Constitutional Law, Courts and Civil Procedure, Municipal Corporations.*
23 ARIZ. REV. STAT. §§ 11-801 to -830 (1956).
24 347 P.2d 581 (Ariz. 1959).
25 86 Ariz. 14, 339 P.2d 1038 (1959); see also *Constitutional Law.*
26 Dallas v. Corp. Comm'n, *supra* note 21.
27 Bianco v. Hess, *supra* note 20.
28 Walker v. De Concini, *supra* note 25.
29 86 Ariz. 158, 342 P.2d 195 (1959); see also Davis, *An Administrative Procedure Act for Arizona,* 2 ARIZ. L. REV. 17 (1960).
30 ARIZ. REV. STAT. §§ 12-901 to -914 (1956).
31 ARIZ. REV. STAT. § 32-554(F) (1956).
32 85 Ariz. 366, 339 P.2d 727 (1959). See also Davis, *supra* note 29.

Standardization Act[33] did not prescribe a definite procedure for judicial review of the supervisor's decision.

Scope of Review.—The problem of whether or not there was substantial evidence in the administrative hearing records to support the trial court's findings that certain orders were invalid was dealt with in the cases of *Foote v. Gerber*[34] and *Vickers v. Western Elec. Co.*[35] In both instances the supreme court affirmed the superior court's findings that the orders were not supported by substantial evidence. The court also, in the case of *Corp. Comm'n v. Reliable Transp.*,[36] affirmed the superior court's finding that certain contract permittees were actually common carriers. The basis for such decision was that there was substantial evidence introduced at the *trial de novo* to support such finding.

A long standing Industrial Commission interpretation, to which the legislature had acquiesced, of the term "partial loss of use" as contained in the statute[37] led the court to affirm the commission's order based on such interpretation in *Weiss v. Industrial Comm'n.*[38]

Joe W. Contreras

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[33] ARIZ. REV. STAT. §§ 3-481 to -523 (1956).
[34] Foote v. Gerber, *supra* note 32.
[35] 86 Ariz. 7, 339 P.2d 1033 (1959); see also *Labor Law.* A companion case is Vickers v. Am. Tel. and Tel. Co., 86 Ariz. 13, 339 P.2d 1037 (1959).
[36] 346 P.2d 1091 (Ariz. 1959).
[37] ARIZ. REV. STAT. § 23-1044(B)(21) (1956).
[38] 347 P.2d 578 (Ariz. 1959); see also *Workmens Compensation.*

AGENCY

Nature of Master-Servant Relationship.—In *Vickers v. Gercke*[1] the defendant maintained that because Mrs. Vickers did not receive any compensation for her services, there was no master-servant relationship. The court, however, felt otherwise and held that an unpaid volunteer helper is a "servant"[2] and not an "invitee" with respect to any rights of recovery against the master for injuries arising out of the master's negligence.

Master's Duty to Provide Safe Working Conditions. —The *Vickers*[3] case and *Figueroa v. Majors*[4] are cases where the Arizona Supreme Court relied on prior decisions by holding that a master has a duty to maintain safe working conditions for his servants.[5] The limitations to this rule were given in *Hoge v. Southern Pacific Co.*[6] The master is not bound to protect his servant from such risks as (1) do not result from the master's negligence, (2) are normal and customary incidents of the employment,[7] and (3) are known, appreciated, and avoidable by the exercise of reasonable care.[8]

Masters' Liability for Medical Treatment to Injured Servant.—In *Southern Pacific Co. v. Hendricks*[9] the court held that in the absence of contractual or statutory obligation the employer is not legally bound to render medical assistance or aid to an employee who suffers illness on the job, when the illness is not a result of the employer's negligence. This is qualified, however, if the employee is so injured as to render him helpless.[10] In that event the employer must exercise reasonable care to procure medical aid.

Liability of Agent Without a Principal.—In *Zugsmith v. Mullins*[11] our court decided that when a party purports to make a contract on behalf of a principal whom he has no power to bind, he thereby becomes subject to liability to the other party upon an implied warranty of author-

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[1] 86 Ariz. 75, 340 P.2d 987 (1959); see also *Courts and Civil Procedure* and *Torts.*
[2] RESTATEMENT (SECOND), AGENCY § 225 (1957).
[3] Vickers v. Gercke, *supra* note 1.
[4] 85 Ariz. 345, 338 P.2d 803 (1959); see also *Courts and Civil Procedure* and *Torts.*
[5] MECHEM, AGENCY § 427 (3d ed. 1923); *accord,* RESTATEMENT (SECOND), AGENCY § 492 (1957).
[6] 85 Ariz. 361, 339 P.2d 393 (1959); see also *Torts.*
[7] MECHEM, AGENCY § 425 (3d ed. 1923); RESTATEMENT (SECOND), AGENCY § 499 (1957).
[8] RESTATEMENT (SECOND), AGENCY § 521 (1957).
[9] 85 Ariz. 373, 339 P.2d 731 (1959); see also *Torts.*
[10] RESTATEMENT (SECOND), AGENCY § 512 (2) (1957).
[11] 344 P.2d 739 (Ariz. 1959); see also *Courts and Civil Procedure.*

ity, unless he manifests that he does not make such a warranty or the other party knows that the agent is not so authorized.[12]

Joseph H. Worischeck

ATTORNEY AND CLIENT

Conduct of Case.—A client's attempt to upset a trial court's decision on grounds of inadequate representation by counsel failed in *State v. Haley*.[1] It was decided that a trial attorney is accorded wide discretion in making or omitting to make objections, and the client is bound by the exercise of the attorney's discretion in these matters.[2]

Attorney's Fees.—Another decision concerning the attorney and client relationship was rendered in *Schwartz v. Schwerin*[3] which held that the amount of compensation for legal services, when not fixed by agreement, should be determined on a "quantum meruit" basis: the reasonable value of services rendered. In ascertaining this, factors to be considered are: (1) qualities of attorney; (2) character of work to be done; (3) work actually performed by attorney; and (4) result of work. Each factor should be considered and no one element should predominate or be given undue weight.[4] The court stated that it could not exercise its independent judgment concerning attorney's fees in dispute, but must affirm the court below if there is substantial evidence to support that court's decision.

Reprimand of Counsel.—In considering a case involving an attorney who admittedly exceeded ethical bounds, the court in *In re Zussman*[5] reiterated an earlier decision[6] to the effect that the objective of disciplinary proceedings is protection of the public, profession, and administration of justice, rather than punishment of the offender.

Theodore Pedersen

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[12] RESTATEMENT (SECOND), AGENCY § 329 (1957); see MECHEM, AGENCY § 347 (3d ed. 1923); SEAVEY, AGENCY 97 (1949).

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[1] 347 P.2d 692 (Ariz. 1959); see also *Constitutional Law, Criminal Law and Procedure,* and *Evidence.*
[2] PIRSIG, THE LEGAL PROFESSION 16 (2d ed. 1957).
[3] 85 Ariz. 242, 336 P.2d 144 (1959); see also *Courts and Civil Procedure.*
[4] CANONS OF PROF. ETHICS, No. 12.
[5] 344 P.2d 1021 (Ariz. 1959).
[6] *In re* Riche, 76 Ariz. 152, 261 P.2d 673 (1953).

CONSTITUTIONAL LAW

Scope of Judicial Review.—The wisdom of the legislature in enacting a statute is of no concern to the supreme court so long as no express or implied constitutional impediments to the enactment can be found. This rule was expounded by the court in *Arizona ex rel. Stidham,*[1] when it declared valid a statute[2] which empowered the appointed clerk of the board of supervisors, rather than the county recorder or some other elected official, to cast a vote to fill a vacancy on the board.

Police Power.—Constitutional impediments were found in *Killingsworth v. West Way Motors, Inc.,*[3] in which certain legislative and administrative regulations prevented the plaintiff from becoming a licensed new motor vehicle dealer.

Granting relief, the court declared a statute requiring the new motor vehicle dealer to have a "permanent enclosed building or structure owned either in fee or leased with sufficient space to display two or more vehicles,"[4] and administrative regulations requiring him to be the "duly authorized distributor . . . for the manufacturer,"[5] to violate the equal protection[6] and due process[7] clauses of both the federal and state constitutions and to exceed the police power of the state.

A statute[8] in *State v. A. J. Bayless Mkt.,*[9] outlawing the sale of milk products containing any oil other than butterfat was held to violate the due process[10] and equal protection[11] clauses when applied to a vendor of frozen milk labeled "Imitation Ice Milk" and containing ingredients as listed on the carton, which included among them vegetable fat. The court distinguished statutes which protected the public against fraud,[12] against inferior products being confused with quality prod-

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[1] 85 Ariz. 365, 339 P.2d 396 (1959). *Accord, In re* Taitmeyer's Estate, 60 Cal App. 2d 699, 141 P.2d 504 (1943); and Butterworth v. Boyd, 12 Cal. 2d 140, 82 P.2d 434 (1938).

[2] ARIZ. REV. STAT. § 11-213 (1956).

[3] 347 P.2d 1098 (Ariz. 1959); see also Gatti v. Highland Park Builders, 29 Cal. App. 326, 155 P.2d 656 (1945); *subsequent opinion* 27 Cal. 2d 687, 166 P.2d 265 (1946); *Ex Parte* McNeal, 32 Cal. App. 2d 391, 89 P.2d 1096 (1939), and *Administrative Law.*

[4] ARIZ. REV. STAT. § 28-1301 (1956).

[5] Rules of Ariz. Highway Dep't., Div. of Motor Vehicles, title 22, art. IV, Rules 16, 17 (1953).

[6] U.S. CONST. amend. XIV, § 1; ARIZ. CONST. art. II, § 4.

[7] U.S. CONST. amend. XIV, § 1; ARIZ. CONST. art. II, § 13.

[8] ARIZ. REV. STAT. § 3-630 (1956).

[9] 86 Ariz. 193, 342 P.2d 1088 (1959). *Cf.* Sage Stores Co. v. Kan. *ex rel.* Mitchell, 323 U.S. 32 (1944). See note—Ariz. L. Rev.—(1959).

[10] U.S. CONST. amend. XIV, § 1; ARIZ. CONST. art. II, § 13.

[11] U.S. CONST. amend. XIV, § 1; ARIZ. CONST. art. II, § 4.

[12] Carolene Products Co. v. United States, 323 U.S. 18 (1944).

ucts,[13] and against foods that were inherently unwholesome.

Obligation of Contract.—The court in *Robinson v. Police Pension Bd.*,[14] declared that it was constitutional for the legislature to pass a modification of a pension statute[15] which changed the method of calculating the pension, even though the change was made one year before the plaintiff retired from the police force. The court pointed out that the retirement statutes were not part of the plaintiff's employment contract because they were enacted subsequent to his employment and were therefore not vested[16] rights.

Vague Statutes.—The question of whether statutes are unconstitutional because of vagueness was considered in *Anthony A. Bianco, Inc. v. Hess*,[17] in which the phrases "commercial production,"[18] and "the unit of one acre in commercial production,"[19] as means of classifying lemon growers, were held not so vague that men of common intelligence must guess at their meaning and differ as to their application.

Again, where a criminal statute made it a crime to encourage the delinquency of a minor[20] with delinquency defined as "any act which tends to debase or injure the morals, health, or welfare of a child,"[21] it was held in *Brockmueller v. State*,[22] that the terminology was sufficiently certain to apprise men of ordinary intelligence of the conduct which the statute prohibited.

Cruel and Inhuman Punishment.—A fifteen-year-old defendant with no prior criminal record claimed that he was being subjected to cruel and inhuman[23] punishment when sentenced to twenty-three to thirty

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[13] Hebe Co. v. Shaw, 248 U.S. 297 (1919).

[14] 85 Ariz. 384, 339 P.2d 739 (1959). *Accord*, Police Pension Bd. v. Denney, 84 Ariz. 394, 330 P.2d 1 (1958), and McCarthy v. Oakland, 60 Cal. App. 2d 546, 141 P.2d 4 (1943). See Brooks v. Pension Bd., 30 Cal. App. 2d 118, 85 P.2d 956 (1938). *But cf.*, Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P.2d 799 (1947). See also *Municipal Corporations.*

[15] ARIZ. REV. STAT. §§ 9-912, 9-925 (1956).

[16] U.S. CONST. art. I, § 10, cl. 1; ARIZ. CONST. art. II, § 25. For a discussion on the proposition that a pension is not a matter of contract and that no legal vested right thereto exists, see Bedford v. White, 106 Colo. 439, 106 P.2d 469 (1940).

[17] 86 Ariz. 14, 339 P.2d 1038 (1959). See, *e.g.*, Old Dearborn Distrib. Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936) Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924), and *Administrative Law.*

[18] ARIZ. REV. STAT. § 3-401 (1956).

[19] ARIZ. REV. STAT. § 3-401 (1956).

[20] ARIZ. REV. STAT. § 13-822 (1956).

[21] ARIZ. REV. STAT. § 13-821 (1956).

[22] 86 Ariz. 82, 340 P.2d 992 (1959). *Accord*, Loveland v. State, 53 Ariz. 131, 86 P.2d 942 (1939). See Connally v. General Constr. Co., 269 U.S. 385 (1926), and *Criminal Law and Procedure.*

[23] ARIZ. CONST. art. II, § 15.

years of imprisonment for robbery,[24] aggravated assault,[25] and lewd and lascivious conduct.[26] The record showed that he was one of a trio who sadistically tortured a youthful hitchhiker; consequently, the court in *State v. Haley*,[27] said that the trial judge had wide latitude in determining the sentence, and that if there were anything cruel and inhuman, it was the acts of the defendant.

Double Jeopardy.—*State v. Wilson*[28] held that there was no double jeopardy[29] when the defendant, who had been convicted of aggravated assault for wounding his wife, was subjected to trial again for murder when she died of the wounds.

Confrontation of Witnesses.—The confrontation of witnesses clause[30] was held in *State v. Mace*,[31] not to require that the complaining witness testify at the trial; it applied only to those witnesses whose testimony at the trial lead to conviction.

Notice.—Failure to issue notice as specified by a state zoning statute,[32] which authorized the county board of supervisors to act on matters of zoning, was held in *Hart v. Bayless Inv. & Trading Co.*[33] to be a violation of due process, even though the intended recipients of the notice did, in fact, acquire the knowledge as contemplated by law.

Accepting Benefits of an Unconstitutional Statute.—Where the litigant in *Anthony A. Bianco Inc. v. Hess*[34] sought to benefit under a particular provision of a statute, he could not contend that another provision thereof was unconstitutional.

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[24] ARIZ. REV. STAT. §§ 13-641 to -643 (1956).
[25] ARIZ. REV. STAT. § 13-245 (1956).
[26] ARIZ. REV. STAT. §§ 13-651, 13-652 (1956).
[27] 347 P.2d 692 (Ariz. 1959). *Accord*, State v. Moody, 67 Ariz. 74, 190 P.2d 920 (1948). See also, *Attorney and Client, Criminal Law and Procedure,* and *Evidence.*
[28] 85 Ariz. 213, 335 P.2d 613 (1959). *Accord*, People v. Harrison, 395 Ill. 463, 70 N.E.2d 596 (1946). See State v. Littlefield, 70 Me. 452 (1880). See also *Criminal Law and Procedure.*
[29] ARIZ. CONST. art. II, § 10,; ARIZ. REV. STAT. §§ 13-145, 13-458 (1956).
[30] ARIZ. CONST. art. II, § 24.
[31] 86 Ariz. 85, 340 P.2d 994 (1959). *Accord*, People v. Ferguson, 410 Ill. 87, 101 N.E.2d 522 (1951). See also, *Criminal Law and Procedure.*
[32] ARIZ. REV. STAT. §§ 11-822, 11-823 (1956).
[33] 346 P.2d 1101 (Ariz. 1959). See also *Administrative Law, Courts and Civil Procedure,* and *Municipal Corporations.*
[34] 86 Ariz. 14, 339 P.2d 1038 (1959). *Accord*, Haggard v. Industrial Comm'n., 71 Ariz. 91, 100, 223 P.2d 915, 921 (1950). See also *Administrative Law.*

Condemnation.—The state in *State v. Jay Six Cattle Co.*,[35] after a condemnation proceeding, paid the full amount of the damages awarded by the jury and entered into possession of the land under both statutory[36] and constitutional[37] authority, but appealed the amount of damages. The court held that such possession and payment did not result in a waiver of the right to appeal.

Taxation Powers.—In *Switzer v. City of Phoenix*,[38] the court entertained the question of whether a city ordinance was constitutional which prescribed, (1) that the principal and interest from a bond issue be paid from the city's share of the state gas tax, and (2) that the statute authorizing the gas tax would not be repealed or *modified* by the city, state legislature, or the people. The court held that the ordinance was invalid to the extent that the language of the resolution purports to require the continuation of all laws *without modification* of the amount of the tax, and as such was unconstiutional[39] as a usurpation of the legislative function of the people of the state. Otherwise the ordinance was held constitutional;[40] it did not encumber the legislators with respect to their power to impose taxes, which the constitution prohibits.

Constitutional Limitations on Municipal Indebtedness.—Where the state constitution[41] limits the total indebtedness of a municipal corporation to four percent of the taxable property, the court held in *Switzer v. City of Phoenix*,[42] that an obligation payable from the city's share of the gas tax collected by the state is not a debt within the meaning of the constitutional limitation.

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[35] 85 Ariz. 220, 335 P.2d 799 (1959). See Hartke v. Abbot, 106 Cal. App. 388, 289 Pac. 206 (1930), and *Real Property. Contra,* Mt. Shasta Power Corp. v. Dennis, 66 Cal. App. 186, 225 Pac. 877 (1924).

[36] ARIZ. REV. STAT. §§ 12-1127, 12-2101 (1956).

[37] ARIZ. CONST. art. II, § 17.

[38] 86 Ariz. 121, 341 P.2d 427 (1959). See also, *Administrative Law* and *Municipal Corporations.*

[39] ARIZ. CONST. art. IX, § 1.

[40] *Ibid.*

[41] ARIZ. CONST. art. IX, § 8.

[42] 86 Ariz. 121, 341 P.2d 427 (1959). *Cf.* Guthrie v. City of Mesa, 47 Ariz. 336, 56 P.2d 655 (1936). See note 38 *supra.*

CONTRACTS

Interpretation.—The Arizona supreme court said in *A.R.A. Mfr. Co. v. Pierce*[1] that it will construe business contracts with a business sense, as they naturally would be understood by intelligent men of affairs.[2] Consequently, the court implied a promise into an exclusive distributorship contract that the manufacturer would do nothing to impair the efforts of the distributor in selling the manufacturer's product, and awarded damages to a sole distributor when the manufacturer mailed certain memorandums to the distributor's customers which mistakenly contained information that undermined the distributor's good will with them.

In another case, *Zancanaro v. Cross*,[3] the court interpreted a written contract for a plumber to install fixtures in houses that were to be erected by the other contracting party, a builder. The court implied a promise into the contract that the builder (1) construct the houses so that the plumbing might be installed therein[4] and (2) do this within a reasonable time.[5] It awarded the plumber damages when these promises were breached. Since it treated the breach as material, the court found it unnecessary to interpret whether a *time of essence clause* in the contract pertained to (1) the builder's promise to construct the houses or (2) his promise to pay for the plumber's performance.[6] The court interpreted a provision in the contract which gave the plumber an *option to ask for additional compensation in the event of delay* not to be an exclusive remedy so as to prevent the plumber from initiating a suit for the contractual breach.[7]

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[1] 86 Ariz. 136, 137, 341 P.2d 929, 930 (1959). Buckley & Scott Util. Inc. v. Petroleum Heat & Power Co., 313 Mass. 498, 503, 48 N.E.2d 154, 157 (1943); Milton v. Hudson Sales Corp., 152 Cal. App. 2d 418, 313 P.2d 936 (1957); *c.f.* Arcoil Co. v. Jacobson Mfg. Co., 7 N.J. Misc. 1024, 147 Atl. 739 (1929). See, 3 CORBIN, CONTRACTS §§ 561-572 (1st ed. 1950); 5 WILLISTON, CONTRACTS § 1293A (2d ed. 1936).

[2] See, The Kronprinzession Cecilie, 244 U.S. 12 (1917); RESTATEMENT, CONTRACTS § 233 (1932); 3 WILLISTON, CONTRACTS § 618 (2d ed. 1936).

[3] 85 Ariz. 394, 339 P.2d 746 (1959). See also *Courts and Procedure.*

[4] Gates v. Ariz. Brewing Co., 54 Ariz. 266, 95 P.2d 49 (1939); 5 WILLISTON, CONTRACTS § 1293 (2d ed. 1936).

[5] United States v. Smith, 94 U.S. 214 (1877); Shimmon v. Moore, 104 Cal. App. 2d 554, 232 P.2d 22 (1951).

[6] See, 3 CORBIN, CONTRACTS § 713 (1st ed. 1950).

[7] See, 3 CORBIN, CONTRACTS § 946 (1st ed. 1950). *But c.f.* Smith v. Quivira Land Co., 153 Kan. 749, 113 P.2d 1077 (1941).

A jury in *Builders Supply Corp. v. Shipley*[8] interpreted whether the acts of the parties terminated a contract for an unlimited time and substituted therefor a less remunerative contract.

Remedies.—Where there had been a material breach of a building contract, in *Zancanaro v. Cross,*[9] the court not only excused the plaintiff from performance,[10] but allowed him to sue for all expected profits from the contract that he could prove.[11]

Specific performance of an option and escrow contract was denied in *Odom v. First Nat'l Bank of Ariz.*[12] when the contract was found by the trial court to be vague and indefinite, obtained by undue influence, and rescinded by a subsequent contract.

Illegal Bargains.—Lassen v. Benton[13] involved a promise by a veterinarian in a small animal hospital to his employer, who was a well-established veterinarian. The employee promised not to practice veterinarian medicine or establish or work in any small animal hospital within twelve miles of the city limits for a period of five years after termination of employment. The court held it was not illegal as a retraint of trade and granted injunctive relief. On rehearing[14] the court refused to modify its opinion even though the defendant asserted that the contract had been abandoned by the employer[15] and if not, that a division of the promise

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[8] 86 Ariz. 153, 341 P.2d 940 (1959). *Accord,* Dover Copper Mining Co. v. Doenges, 40 Ariz. 349, 12 P.2d 288 (1932). See, RESTATEMENT, CONTRACTS §§ 407, 408 (1932), 4 WILLISTON, CONTRACTS §§ 1027, 1027A (2d ed. 1936).

[9] 85 Ariz. 394, 339 P.2d 746 (1959). See also *Courts and Procedure,* and *Evidence.*

[10] See, 5 WILLISTON, CONTRACTS §§1363, 1363A (2d ed. 1936).

[11] See, RESTATEMENT, CONTRACTS § 331 (1932).

[12] 85 Ariz. 238, 336 P.2d 141 (1959). See RESTATEMENT, CONTRACTS §§ 367, 370, 407, 408 (1932); 5 WILLISTON, CONTRACTS § 1425 (2d ed. 1936). See also *Courts and Procedure.*

[13] 346 P.2d 137 (Ariz. 1959). *Accord,* Briggs v. Butler, 140 Ohio 499, 45 N.E.2d 757 (1942). See, Henderson v. Jacobs, 73 Ariz. 195, 239 P.2d 1082 (1952); Bauer v. Sawyer, 6 Ill. App. 2d 178, 126 N.E.2d 844 (1955); Granger v. Craven, 159 Minn. 296, 199 N.W. 10 (1924); Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823 (1951); RESTATEMENT, CONTRACTS §§ 513, 514, 515, 516(f) (1932); 5 WILLISTON, CONTRACTS §§ 1637, 1643, 1652 (2d ed. 1936).

[14] Lassen v. Benton, 347 P.2d 1012 (Ariz. 1959). See also *Courts and Procedure.*

[15] See, RESTATEMENT, CONTRACTS § 415 (1932); 6 WILLISTON, CONTRACTS § 1831 (2d ed. 1936).

should be made and only the promise not to establish or work in a small animal hospital be enforced.[16]

On the other hand, where a statute[17] prescribed that a pawnbroker could charge no more than two percent interest per month, a pawnbroker in *Ferguson v. Rubin*[18] was prevented from collecting more than that because the contract he made was illegal. The pawnbroker alleged that he *contracted to purchase* a $500 ring for $200, promising not to resell it for a month during which time the former owner might buy it back for $250. The court refuted his theory and declared, as a matter of law, that the pretended sale was a contract to lend money and that the amount charged above the statutory two percent was void.

Again, where a statute[19] made it unlawful to charge any premium for an insurance contract which was not written on the face of the policy, a separate written contract to pay more than the premium indicated on the face of a surety bond was determined by the court in *Commercial Standard Ins. Co. v. Cleveland*[20] to be illegal and therefore void.

Implied Warranties.—The court in *Voight v. Ott*,[21] after determining that a heating and cooling device installed in a house was a defective fixture, refused to grant relief to a purchaser of the home who asserted the theory that there was a breach of an implied warranty as to quality or condition. The court held that the fixture, being real property, carried (with it) no implied warranty.

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[16] See, RESTATEMENT, CONTRACTS § 518 (1932); 6 WILLISTON, CONTRACTS § 1659 (2d. ed. 1936). *But c.f.* Fullerton Lumber Co. v. Torborg, 270 Wis. 133, 70 N.W.2d 585 (1955).

[17] ARIZ. REV. STAT. §§ 44-1621, 44-1624 (1956) .

[18] 85 Ariz. 351, 339 P.2d 387 (1959). See, RESTATEMENT, CONTRACTS §§ 526, 529 (1932); 6 WILLISTON, CONTRACTS § 1687 (2d ed. 1936).

[19] ARIZ. CODE ANN. §§ 61-334, 61-801 (1939). (These statutes have since been repealed.)

[20] 345 P.2d 210 (Ariz. 1959). *Accord,* Northern v. Elledge, 72 Ariz. 166, 232 P.2d 111 (1951). See, RESTATEMENT, CONTRACTS §§ 580, 598 (1932); 6 WILLISTON, CONTRACTS §§ 1683, 1687 (2d ed. 1936). See also *Courts and Procedure* and *Insurance.*

[21] 86 Ariz. 128, 341 P.2d 923 (1959). *Accord,* Allen v. Reichert, 73 Ariz. 91, 237 P.2d 818 (1951). See, 4 WILLISTON, CONTRACTS § 926 (2d ed. 1936). See also *Evidence* and *Real Property.*

COURTS AND CIVIL PROCEDURE

Jurisdiction.—An attempt by an intervenor to obtain a writ of prohibition was denied in *Kemble v. Stanford*[1] where the court ruled that a claimant had first to go to the trial court as a litigant before he could test its jurisdiction in the appellate court.[2]

Harbel Oil Co. v. Superior Court[3] held that the superior court did not exceed its jurisdiction in giving judgment contrary to an express mandate of the supreme court, when such judgment was based upon other matters than were before the appellate court when the mandate was given.[4]

The companion cases of *Abbot v. Superior Court*[5] and *Kautenberger v. Superior Court*[6] granted writs of prohibition where the superior court was acting without jurisdiction on an invalid indictment.

That the superior court could hold a zoning ordinance invalid, if it were clearly so, was the rule of *Hart v. Bayless Inv. and Trading Co.*[7] where the court distinguished between an ordinance and a legislative enactment.

In *Allen v. Superior Court*[8] the court relied upon the rule[9] that a civil action is commenced by filing a complaint, in deciding that the Superior Court of Maricopa County had no jurisdiction over a divorce action filed by the petitioner's wife in Maricopa County subsequent to her filing a like complaint in the Superior Court of Cochise County.[10]

Venue.—Change of venue was the chief problem in *Sulger v. Superior Court*[11] in which the court ruled that an action based upon slander was a *trespass* within the meaning of the Arizona statute[12] authorizing commencement of action in the county of commission of the crime, offense, or trespass. Thus when venue was changed from county of commission to the county of defendant's residence, the latter court received no

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[1] 347 P.2d 28 (Ariz. 1959); see also *Domestic Relations.*
[2] See ARIZ. R. CIV. P. 24(a): "Upon timely application . . . (one) shall be permitted to intervene"; 2 BARRON & HOLTZOFF, FED. PRACTICE AND PROC. § 597 (Rules ed. 1950).
[3] 86 Ariz. 303, 345 P.2d 427 (1959).
[4] Bank of Ariz. v. Superior Court, 30 Ariz. 72, 245 Pac. 366 (1926).
[5] 86 Ariz. 309, 345 P.2d 776 (1959); see also *Criminal Law and Procedure.*
[6] 86 Ariz. 315, 345 P.2d 779 (1959); see also *Criminal Law and Procedure.*
[7] 86 Ariz. 379, 346 P.2d 1101 (1959); see also *Administrative Law, Constitutional Law,* and *Municipal Corporations.*
[8] 86 Ariz. 205, 344 P.2d 163 (1959); see also *Domestic Relations.*
[9] ARIZ. R. CIV. P. 3.
[10] Davies v. Russell, 84 Ariz. 144, 325 P.2d 402 (1958); 1 BARRON & HOLTZOFF, FED. PRACTICE AND PROC. § 161 (Rules ed. 1950).
[11] 85 Ariz. 299, 337 P.2d 285 (1959); see also *Torts.*
[12] ARIZ. REV. STAT. § 12-401(10) (1956).

jurisdiction from the original court which transferred the case erroneously.[13] In addition the clerks of the superior courts were released as improper parties in original certiorari proceedings.

Ward v. Stevens[14] involved a situation where plaintiffs brought an action in one county and later authorized the judge in another county to take depositions from the defendants. It was held that the latter had no power to *stay* the taking of depositions.[15]

Res Judicata.—In *Hoff v. City of Mesa*,[16] a second action commenced against parties that had previously been awarded a dismissal on the merits for failure to state a claim. The new pleadings contained the same allegations with one addition. The court held that an action involuntarily dismissed upon its merits was *res judicata* and new facts may not be added to raise the issue again.[17]

Discoveries and Interrogatories.—In *Schwartz v. Schwerin*[18] the trial court refused to hear plaintiff's testimony on matters on which he had refused or failed to give information in response to defendant's written interrogatories. The court, on grounds of *estoppel*, held that the trial court may require a party to stand on answers previously refused.[19] On another count, reversal of judgment was had on the well-settled rule that an admission in an answer is binding on the party making it, and is conclusive as to the admitted fact.[20]

Watts v. Superior Court[21] based on Arizona Rule of Civil Procedure 34[22] ruled that plaintiff had "good cause" for an order requiring production for inspection of a statement given by the plaintiff to a claims investigator who did not furnish her with a copy. The statement was given while the plaintiff was in the hospital, unrepresented by counsel, and before the action was commenced.[23]

Failure of Pleadings.—*City of Phoenix v. Linsenmyer*[24] repeated once

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[13] ARIZ. REV. STAT. § 12-404 (1956).
[14] 86 Ariz. 222, 344 P.2d 491 (1959).
[15] See ARIZ. R. CIV. P. 30(c), (e); Jasper v. Batt, 76 Ariz. 328, 332, 264 P.2d 409, 411 (1953) (dictum).
[16] 86 Ariz. 259, 344 P.2d 1013 (1959).
[17] ARIZ. R. CIV. P. 41(b).
[18] 85 Ariz. 242, 226 P.2d 144 (1959); see also *Attorney and Client.*
[19] See ARIZ. R. CIV. P. 37(d).
[20] Lifton v. Harshman, 80 Cal. App. 2d 472, 182 P.2d 222 (1947); Razzanno v. Kent, 78 Cal. App. 2d 254, 177 P.2d 612 (1947).
[21] 347 P.2d 565 (Ariz. 1959).
[22] See ARIZ. R. CIV. P. 34; 2 BARRON & HOLTZOFF, FED. PRACTICE AND PROC. § 796 (Rules ed. 1950).
[23] Dowell v. Superior Court, 47 Cal. 2d 483, 304 P.2d 1009 (1956).
[24] 86 Ariz. 328, 346 P.2d 140 (1959); see also *Municipal Corporations.*

again the rules[25] that failure to plead an affirmative defense is a waiver of that defense and that pleadings cannot be amended after judgment without the consent of the other parties to the action. Closely aligned was the case of *Dallas v. Ariz. Corp. Comm.*[26] where the court held that an opening brief answered only by a motion to quash was admitted as true in statements and allegations.

Injunction with Bond.—The superior court was prohibited from issuing an injunction coupled with a small monetary bond in *Cloeter v. Superior Court.*[27] The court found the legal remedies of garnishment and attachment to be adequate under the circumstances. These remedies require the posting of a *realistic* bond.

Summary Judgments.—In *Perez v. Tomberlin*[28] the plaintiff appealed from a summary judgment rendered on a point of conflicting evidence between the plaintiff's earlier and present testimony. In denying the appeal the court re-emphasized the rule[29] that summary judgments are not to try issues of fact, but rather to decide whether there are genuine issues of fact disputed in good faith upon which there should be a trial.

That legal guardians had no legal rights to notice of hearings or privilege of producing evidence was decided by *In re Johnson*[30] where the supreme court upheld a summary judgment of the juvenile court returning the custody of the petitioner's wards to their mother.[31]

Instructions.—Considering the instructions as a whole,[32] the court in *City of Yuma v. Evans*[33] held an instruction that a landlord must exercise a "high degree" of care, which had been immediately preceded by an instruction setting forth the requirement of ordinary care commensurate with the risk, to be merely a statement of the amount of care necessary.[34] In *State v. Sorrell*[35] the court held that instructions must be viewed as a whole, and if free from error, pieces that tend to be misleading

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[25] ARIZ. R. CIV. P. 8(d), 15(a)(1).
[26] 86 Ariz. 345, 346 P.2d 152 (1959); see also *Administrative Law.*
[27] 347 P.2d 33 (Ariz. 1959).
[28] 86 Ariz. 66, 340 P.2d 982 (1959).
[29] ARIZ. R. CIV. P. 56(d).
[30] 86 Ariz. 297, 345 P.2d 423 (1959); see also *Domestic Relations.*
[31] ARIZ. REV. STAT. § 8-233 (1956).
[32] Tucker v. Lombardo, 47 Cal. 2d 457, 303 P.2d 1041 (1957).
[33] 85 Ariz. 229, 336 P.2d 135 (1959); see also *Evidence, Municipal Corporations,* and *Torts.*
[34] See Jost v. Ross, 82 Ariz. 245, 311 P.2d 840 (1957).
[35] 85 Ariz. 173, 333 P.2d 1081 (1959); see also *Criminal Law and Procedure* and *Evidence.*

standing alone do not prejudice the rights of the defendant.[36]

Builders Supply Corp. v. Shipley[37] held that an instruction which assumes one of the facts in issue is properly refused.[38] In *Jiminez v. Starkey*[39] the court ruled that it must be presumed the jury obeyed the instructions of the trial court that the negligence of a driver could not be imputed to a minor passenger.[40]

Reasoning from former Arizona opinions[41] the court broadened the rule on jury instructions concerning contributory negligence in *Michie v. Calhoun*.[42] The court held unconstitutional an instruction that should the jury find certain facts to be true, the plaintiff's deceased was contributorily negligent as a matter of law.[43] The Arizona Constitution[44] requires the defense of contributory negligence to be a question of fact for the jury.

Directed Verdicts.—The court seemed to apply the "new trial" rule in *Golfinos v. So. Pac. Co.*[45] in holding that the trial court is justified in directing a verdict only where the evidence is insufficient to support a contrary verdict or so weak that the court would feel constrained to set aside a verdict on motion for new trial.[46] However, in *Vickers v. Gercke*[47] and in *Figueroa v. Major*[48] directed verdicts were reversed by the court holding in accordance with the "reasonable inference" rule that there was sufficient evidence from which reasonable men could draw different inferences on the question of negligence.[49] *Jimenez v. Starkey*[50] affirmed a refusal of the trial court to direct a verdict for plaintiff and held that the trial court will not weigh evidence and substitute its judgment

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[36] Kinsey v. State, 49 Ariz. 201, 65 P.2d 1141 (1937); Judd v. State, 41 Ariz. 176, 16 P.2d 720 (1932).

[37] 86 Ariz. 153, 341 P.2d 940 (1959); see also *Contracts* and *Evidence*.

[38] Mut. Benefit Health & Acc. Ass'n v. Neale, 43 Ariz. 532, 33 P.2d 604 (1934); Atchison T. & S.F. Ry. Co. v. Gutierrez, 30 Ariz. 491, 249 Pac. 67 (1926).

[39] 85 Ariz. 194, 335 P.2d 83 (1959); see also *Evidence* and *Torts*.

[40] See also Cooke v. Townley, 265 P.2d 1108 (Okla. 1951); Porter v. Dep't of Labor & Indus., 51 Wash. 2d 634, 320 P.2d 1099 (1958). The court cannot presume that jury did not obey instructions, Hall v. Chicago N. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955).

[41] Wolfswinkel v. So. Pac. Co., 82 Ariz. 33, 307 P.2d 1040 (1957); Zancanaro v. Hopper, 79 Ariz. 207, 286 P.2d 205 (1955); Butane Corp. v. Kirby, 66 Ariz. 272, 187 P.2d 325 (1947).

[42] 85 Ariz. 270, 336 P.2d 370 (1959); see also *Torts*.

[43] See Lutzen v. Henry Jenkins Transp. Co., 133 Conn. 669, 54 A.2d 267 (1947).

[44] ARIZ. CONST. art 18, § 5.

[45] 86 Ariz. 315, P.2d 780 (1959); see also *Torts*.

[46] Picow v. Baldwin, 77 Ariz. 395, 272 P.2d 613 (1954); Bassett v. Ryan, 72 Ariz. 383, 236 P.2d 458 (1951).

[47] 86 Ariz. 75, 340 P.2d 987 (1959); see also *Agency* and *Torts*.

[48] 85 Ariz. 345, 338 P.2d 803 (1959); see also *Agency* and *Torts*.

[49] Stanek v. Cole, 178 F.2d 122 (7th Cir. 1949); Matsumato v. Ariz. Sand & Rock Co., 80 Ariz. 232, 295 P.2d 850 (1956); Cope v. So. Pac. Co., 66 Ariz. 197, 185 P.2d 772 (1947).

[50] Jimenez v. Starkey, *supra* note 39.

for that of the jury if there is substantial evidence to warrant submitting the case to the jury.[51]

Damages.—On rehearing[52] of *Lassen v. Benton*[53] it was held error on the part of the supreme court to remand a case to the trial court for assessment of damages when no proof of damages had ever been offered. In *Zancanaro v. Cross*,[54] where a judgment rendered by the trial court had been properly given, but for an incorrect amount, it was decided that the supreme court may do justice without remanding the case for a new trial by modifying the amount of the judgment.[55]

Costs.—In *Cleveland v. Douglas*[56] the court held that since attorney's fees are not recoverable, unless provided for by contract or statute,[57] the cost of hiring an attorney to take an out-of-state deposition may not be taxed as a cost, nothwithstanding the cost of taking depositions is an allowable item.[58]

New Trials.—In *Zugsmith v. Mullins*,[59] where it was apparent that the jury decided the case on the evidence, the court held that it was an abuse of the discretion of the trial court to grant a new trial predicated upon the alleged misconduct of the plaintiff's attorney.[60]

Review of Evidence.—In a number of decisions[61] the court reaffirmed the well-established rule that upon appeal findings of fact will not be disturbed when there is substantial evidence to support them.

Lee R. Perry

Robert B. Buchanan

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[51] See, *e.g.*, Tremaine Alfalfa Ranch & Milling Co. v. Carmichael, 32 Ariz. 457, 259 Pac. 884 (1927); Kindelspire v. Lawrence, 47 Wash. 2d 722, 270 P.2d 477 (1954); Cude v. Culbertson, 30 Tenn. App. 628, 209 S.W.2d 506 (1947).

[52] 347 P.2d 1012 (Ariz. 1959).

[53] 86 Ariz. 323, 346 P.2d 137 (1959); see also *Contracts*.

[54] 85 Ariz. 394, 339 P.2d 746 (1959); see also *Contracts*.

[55] See, *e.g.*, Farnsworth v. Hubbard, 78 Ariz. 160, 277 P.2d 252 (1954); Barbara Dev. Corp. v. Jordan, 37 Ariz. 497, 295 Pac. 782 (1931); Busboom v. Smith, 199 Okla. 688, 191 P.2d 198 (1948).

[56] 86 Ariz. 288, 345 P.2d 210 (1959); see also *Contracts* and *Insurance*.

[57] U. S. Fid. & Guar. Co. v. Frohmiller, 71 Ariz. 377, 227 P. 2d 1007 (1951); Stapley v. Rogers, 25 Ariz. 308, 216 P.2d 1072 (1923).

[58] ARIZ. REV. STAT. § 12-332(A) (1956).

[59] 86 Ariz. 736, 344 P.2d 739 (1959); see also *Agency*.

[60] See ARIZ. R. CIV. P. 59(a).

[61] Poley v. Bender, 347 P.2d 696 (Ariz. 1959); see also *Torts;* Smith v. Conner, 347 P.2d 568 (Ariz. 1959), see also *Trusts;* Hurst v. Hurst, 86 Ariz. 242, 344 P.2d 1001 (1959); see also *Partnership;* Builders Supply Corp. v. Shipley, *supra* note 37; Kellog v. Bowen, 85 Ariz. 304, 337 P.2d 628 (1959); Schwartz v. Schwerin, *supra* note 18; Odom v. First Nat'l Bank of Ariz., 85 Ariz. 238, 336 P.2d 141 (1959); see also *Contracts*.

CREDITOR'S RIGHTS

Agister's Lien.—In a case establishing a new precedent, *Shartzer v. Ulmer*,[1] the plaintiff entered into an agreement with the lessee of a ranch to pasture his cattle and paid the lessee in full for the pasturage. The landowner claimed an agistor's lien on the cattle for nonpayment of rent to him by his lessee. The court held that an agistor's lien is statutory unless created by contract,[2] and that under the applicable statute[3] only the lessee, being in complete possession of the premises, could "furnish" the land thereby acquiring an agistor's lien.

Garnishment.—The supreme court, in *Sandia Development Corporation v. Allen*,[4] merely restated the doctrine, well established in this jurisdiction,[5] that a garnishor being only an unsecured creditor of the defendant can, at the most, recover no more than the defendant could recover against the garnishee in a direct action.

Moise E. Berger

CRIMINAL LAW AND PROCEDURE

Contributing to delinquency.—Affirming the conviction of a defendant who told a young girl that it "wasn't really bad" to pose for pictures in the nude, the court held in *Brockmueller v. State*[1] that, under the contributing to delinquency statute,[2] *any direct participation* in encouraging delinquency of a child, as defined by statute,[3] is prohibited whether or not the encouragement amounted to aiding and abetting.

A requested instuction that the crime of contributing to the delinquency of a minor is an included offense in a rape charge was rejected

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[1] 85 Ariz. 179, 333 P.2d 1084 (1959); see also *Torts*.
[2] 1 JONES, LIENS § 641 (3d ed. 1914).
[3] ARIZ. REV. STAT. § 33-921 (1956). "Persons who *furnish* pasture or feed for livestock to be fed on the premises of the person furnishing the pasture or feed shall have a lien on the stock for the amount of the charges due and unpaid. A person having such lien may take possession of and retain the stock until the charges are paid . . . ." (Emphasis added.) This provision is similar in content to ARIZ. CODE ANN. § 64-404 (1939).
[4] 86 Ariz. 40, 340 P.2d 193 (1959); see also *Evidence* and *Corporations*.
[5] Wilkinson v. Takesuye, 66 Ariz. 205, 185 P.2d 778 (1947); Valley Products Inc. v. Kubelsky, 49 Ariz. 500, 68 P.2d 69 (1937); Ellery v. Cumming, 40 Ariz. 512, 14 P.2d 709 (1932).

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[1] 86 Ariz. 82, 340 P.2d 992 (1959); see also *Constitutional Law*.
[2] ARIZ. REV. STAT. § 13-822 (1956).
[3] ARIZ. REV. STAT. § 13-821(c) (1956). "Delinquency means any act which tends to debase or injure the morals, health or welfare of a child."

by the court in *State v. Romero.*[4] Refusing to follow the California rule[5] that it is a necessarily included offense, the court reasoned that while acts charged in the commission of a rape may contribute to the delinquency of a minor, that does not necessarily mean that the trial court must always include an instruction on contributing to delinquency of a minor in a rape case.[6] A case that the California court strongly relied upon in reaching its decision, *People v. Greer,*[7] was distinguished from the principal case by our court on the grounds that its facts involved the question of double jeopardy. The dissenting opinion stated that it is impossible to commit intercourse with a female under eighteen without also causing, encouraging, or contributing to an act tending to injure or debase her health, morals or welfare.[8] The dissent stated that *People v. Greer* was not intended by the California court to have such a distinction as our court applied to it, and that the test laid down in that case was intended to apply to any case involving the issue of a necessarily included offense. The California court had asked the question, "Is the first offense one that cannot be committed without necessarily committing the second?" The dissent stated that the same test has been applied in a number of cases in Arizona.[9]

Bogus Check.—In *State v. Wittman*[10] the defendant had a checking account under one name but wrote a check in a different name and in excess of her account. She appealed her conviction on the grounds that she should have been tried under the insufficient funds statute.[11] Her conviction was affirmed, the court holding that in such circumstances the check is false and bogus and the defendant may properly be prosecuted under the statute[12] relating to bogus checks.

Principal.—In another case involving the application of a criminal statute[13] a defendant stood nearby while his companion robbed a man of his money and a check. The defendant later deposited the check to his own business account. In *State v. Roberts*[14] he was found guilty of rob-

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[4] 85 Ariz. 263, 336 P.2d 366 (1959).
[5] People v. Chester, 138 Cal. App. 2d 829, 292 P.2d 573 (1956).
[6] See notes 2 and 3 *supra;* Gouchenour v. State, 202 Ind. 231, 173 N.E. 191 (1930).
[7] 30 Cal. 2d 589, 184 P.2d 512 (1947).
[8] 85 Ariz. 263, 267-69, 336 P.2d 366, 368-70 (1959) (dissenting opinion).
[9] State v. Westbrook, 79 Ariz. 116, 285 P.2d 161 (1954); State v. Hanks, 58 Ariz. 77, 118 P.2d 71 (1941); Dunn v. State, 50 Ariz. 473, 73 P.2d 107 (1937).
[10] 85 Ariz. 292, 337 P.2d 280 (1959).
[11] ARIZ. REV. STAT. § 13-316 (1956).
[12] ARIZ. REV. STAT. § 13-311 (1956).
[13] ARIZ. REV. STAT. § 13-139 (1956). "All persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense . . . or aid and abet in its commission . . . are principals in any crime so committed."
[14] 85 Ariz. 252, 336 P.2d 151 (1959).

bery as a principal by reason of acting in concert with another and aiding and abetting in the commission of a crime.[15]

Institution of criminal proceedings.—May a person properly be charged with a felony complaint commenced by the complaining witness upon "his information and belief"? This question, recently certified to the supreme court, was answered in the affirmative in *State v. Currier*,[16] which firmly established a rule that had previously been handed down by our supreme court in one recent Arizona case[17] and stated as strong dicta in another, earlier one.[18]

Institution of criminal proceedings by indictment was dealt with in *Abbott v. Superior Court*[19] and *Kautenburger v. Superior Court*.[20] In the *Abbott* case the court ruled for the first time that sixteen grand jurors constitute a quorum, the lack of which will nullify an indictment returned against a defendant. Another previously undecided question was settled when the court also determined that the attempted summarization of testimony heard during the absence of grand jurors will vitiate any true bill returned in which such absent jurors participated.

Another decision establishing precedent was handed down by the supreme court in *State v. Wilson*.[21] In that case the defendant's wife had been shot between the eyes and apparently recovered, but died approximately nine months later. The court held that a conviction on a charge of assault with a deadly weapon does not bar a prosecution for murder when the victim dies after the first trial. To be a bar, the two offenses must be the same in law and in fact.[22]

Separate Trial.—In *State v. Roberts*[23] the court restated the rule that the right of the trial court to grant a separate trial is discretionary.[24] The decision of the trial court was upheld due to the lack of evidence of an abuse of discretion.

Evidence.—The general rule, well established in this state, that an accused who takes the stand in his own behalf may be impeached by

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[15] See CLARK & MARSHALL, CRIMES § 8.02 (6th ed. 1958) (common-law rule).
[16] 347 P.2d 29 (Ariz. 1959).
[17] State v. Colvin, 81 Ariz. 388, 307 P.2d 98 (1957).
[18] Turley v. State, 48 Ariz. 61, 59 P.2d 312 (1936).
[19] 86 Ariz. 309, 345 P.2d 776 (1959); see also *Courts and Civil Procedure.*
[20] 86 Ariz. 315, 345 P.2d 779 (1959); see also *Courts and Civil Procedure.*
[21] 85 Ariz. 213, 335 P.2d 613 (1959); see also *Constitutional Law.*
[22] People v. Harrison, 395 Ill. 463, 70 N.E.2d 596 (1946); 1 BISHOP, NEW CRIMINAL LAW § 1059 (8th ed. 1892).
[23] See note 14 *supra.*
[24] State v. Smith, 60 Ariz. 305, 135 P.2d 879 (1943); State v. Sanchez, 59 Ariz. 426, 428, 129 P.2d 923, 923-924 (1942) (dictum).

interrogation relative to prior convictions of felonies[25] was broadened somewhat by the court's decision in *State v. Sorrell*[26] that the admission in evidence of the record of a felony, *although the defendant has admitted the prior* conviction, does not affect his substantial rights and is not, therefore, reversible error. The test is, had the error not been committed, is there reasonable probability that the verdict might have been different.

Where during the trial the witnesses were placed under the rule excluding them from the courtroom, yet a state's witness who had been in the courtroom was allowed to testify, the court in *State v. Romero*[27] restated the rule, well established in Arizona, that such is solely a matter within the discretion of the trial court unless there is an abuse of discretion and a resulting prejudice.[28]

In *State v. Haley*[29] the defendant and two other youths were tried jointly for having robbed, beaten and sexually abused a 16-year-old hitchhiker. The other two youths confessed. On appeal the court restated the rule that where evidence is admissible as to one of several defendants it becomes the duty of the others to submit instructions limiting its effect and failure to request such a limiting instruction constitutes a waiver of any right to such an admonition.[30]

In another recent appellate case, *State v. Mace*,[31] the complaining witness was absent during the trial and offered no testimony. Affirming a conviction by the trial court, it was held that under the Arizona Constitution[32] the right of an accused in a criminal prosecution "to meet the witness against him face to face" is the right to face those persons *whose testimony is offered at trial.*[33]

The defendant was denied a continuance in *State v. Mace* because he could not allege due diligence in trying to obtain the absent complaining witness.[34] Appellant was not justified in relying on the state to se-

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[25] McCormick, Evidence §§ 42, 43 (1954); see 3 Wigmore, Evidence § 980 (3d ed. 1940).

[26] 85 Ariz. 173, 333 P.2d 1081 (1959); see also *Courts and Civil Procedure* and *Evidence.*

[27] See note 4 *supra.*

[28] State v. Thomas, 78 Ariz. 52, 275 P.2d 408 (1954); Riley v. State, 50 Ariz. 442, 73 P.2d 96 (1937); Macias v. State, 36 Ariz. 140, 283 Pac. 711 (1929).

[29] 347 P.2d 692 (Ariz. 1959); see also *Attorney and Client, Constitutional Law,* and *Evidence.*

[30] State v. Polan, 80 Ariz. 129, 293 P.2d 931 (1956); Sisson v. State, 16 Ariz. 170, 141 Pac. 713 (1914); McCormick, Evidence § 59 (1954); 1 Wigmore, Evidence § 13 (3d ed. 1940).

[31] 86 Ariz. 85, 340 P.2d 994 (1959); see also *Constitutional Law.*

[32] Ariz. Const. art. 2, § 24.

[33] McCreight v. State, 45 Ariz. 269, 271, 42 P.2d 1102, 1103, (1935) (dictum).

[34] Ariz. R. Crim. P. 244. "If the application for continuance is on the ground that a witness is absent it shall state: . . . Facts showing that due diligence has been used to obtain the witness."

cure the witness's presence at the trial.[35]

Another decision handed down by the supreme court in *State v. Mace* was new law for this jurisdiction. Where witnesses' testimony has clearly established that an object has been used as a weapon, it is not improper for the term "weapon" to be used to describe it when each of the witnesses who so testified, had observed the affray.

Instructions.—Precedent was established in *State v. Sorrell*[36] where the inclusion with otherwise correct instructions of an instruction not supported by the evidence was held to constitute technical error not affecting the substantial rights of the defendant. The court assumed that the jury were persons of ordinary intelligence and knew that the instruction given did not apply. Instructions must be considered as a whole and, if as a whole they are free from error, an isolated portion, which standing alone might be misleading, does not constitute reversible error.

By its recent decision in *State v. Thomas,*[37] that the use of Voeckell instruction[38] will no longer be tolerated and approved, the supreme court overruled a line of precedent previously established in Arizona to the effect that such instruction would, in the proper circumstances, be upheld.[39] The court stated that the instruction had been before it four times and it was now clear that its validity depends upon the facts and circumstances of each particular case. No rule can be formulated circumscribing definite bounds of when and where or under what circumstances it should be given or refused. The court concluded that its continued use would result in an "endless chain of decision," based on varying facts and circumstances and changing personalities of the appellate court and, therefore, it is not in keeping with sound justice and the preservation of human liberties and security.

Pre-sentence Hearing.—Concerning the aspect of criminal procedure following the trial, in *State v. Fenton*[40] the defendant entered a plea of guilty to first-degree murder, and a pre-sentence hearing was held to determine whether the court, in its discretion, should impose a sen-

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[35] State v. Jordan, 83 Ariz. 248, 320 P.2d 446 (1958) *cert. denied,* 358 U. S. 859 (1958) (memorandum decision).

[36] See note 26 *supra.*

[37] 86 Ariz. 161, 342 P.2d 197 (1959).

[38] Voeckell instructions are those instructions given to a jury unable to reach a verdict to the effect that the jurors, especially those in the minority, should reconsider their decision. Because of the particular circumstances and the manner in which it is given it tends to coerce the jurors into abandoning their beliefs in order to reach a verdict without further delay. It has sometimes been referred to as "the third-degree instruction."

[39] State v. Craft, 85 Ariz. 143, 333 P.2d 728 (1958); State v. Lubetkin, 78 Ariz. 91, 276 P.2d 520 (1954); State v. Voeckell, 69 Ariz. 145, 210 P.2d 972 (1949).

[40] 86 Ariz. 111, 341 P.2d 237 (1959).

tence of life imprisonment or death.[41] The court held that it is proper at the pre-sentence hearing to consider the possibility of parole or release should the court determine the sentence to be life imprisonment.[42]

Also, in *State v. Fenton,* the court restated the rule that the power given to the supreme court to reduce the sentence of a lower court[43] should be used only when it clearly appears that a sentence is too severe and that there has therefore been an abuse of discretion.[44] The court concluded that under the facts in this particular case there had not been an abuse of discretion by the trial court.

Review.—In *State v. Superior Court,*[45] although the issue had become moot, the court granted a petition for certiorari because the question of law involved was a continuing one involving a widespread judicial practice. Construing together two rules of the supreme court,[46] it was held that the judge of a superior court has no power to issue an order extending the time in which the record on appeal in a criminal case must be sent to the clerk of the supreme court to a day exceeding ninety days from the date of the filing of the notice of appeal.

The court concluded that certiorari is the proper remedy to review such an extension order because the order itself is not appealable and there is no plain, speedy, and adequate remedy at law.[47]

Appellate procedure was also dealt with by the supreme court in *State v. Sanders*[48] where the court restated the rule that failure of an appellee to file an answering brief in a criminal trial is a confession on the part of the appellee of reversible error.[49]

Moise E. Berger

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[41] ARIZ. R. CRIM. P. 336.

[42] State v. Smith, 66 Ariz. 376, 189 P.2d 205 (1948); see Chee v. State, 65 Ariz. 147, 176 P.2d 366 (1947); State v. Levice, 59 Ariz. 472, 130 P.2d 53 (1942); James v. State, 53 Ariz. 42, 84 P.2d 1081 (1938).

[43] ARIZ. REV. STAT. § 13-1717 (1956).

[44] State v. Guerrero, 58 Ariz. 421, 120 P.2d 798 (1942).

[45] 86 Ariz. 231, 344 P.2d 736 (1959).

[46] ARIZ. SUP. CT. RULE 3(a)(2). "If an enlargement of time is desired under Rules of Civil Procedure, 73(s), appellant shall obtain an order therefore . . . but such extension shall not be to a day more than ninety days from the date of the first notice of appeal."

ARIZ. SUP. CT. RULE 15. "The Rules of this court pertaining to civil appeals and not conflicting with Rules specifically pertaining to appeals in criminal actions, when applicable and insofar as they are practicable, shall govern appeals in criminal actions."

[47] ARIZ. REV. STAT. § 12-2001 (1956). "The writ of certiorari may be granted by the supreme and superior courts or by any judge thereof, in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal, nor, in the judgement of the court, a plain, speedy and adequate remedy."

[48] 85 Ariz. 217, 335 P.2d 616 (1959).

[49] Stover v. Kesmar, 84 Ariz. 387, 329 P.2d 1107 (1958).

DOMESTIC RELATIONS

Separate Maintenance.—The supreme court was confronted with the problem of whether writs of prohibition should be issued to restrain the superior court from enforcing an order for the payment of money in the cases of *Porter v. Stanford*[1] and *Kemble v. Stanford.*[2] Such order was made pending determination whether certain property was community as alleged by the wife in her separate maintenance action. In both instances the court denied the writs of prohibition holding in *Porter*[3] that by statute[4] the lower court had jurisdiction to enter such order notwithstanding the claim that the property was owned by a partnership, and holding in *Kemble*[5] that petitioner is required to test his claim of superiority of lien in the court which issued such order.

Divorce.—A decree of divorce obtained by a husband on grounds of cruelty was reversed in *Williams v. Williams*[6] on the basis that the sole corroborative testimony of a fellow worker that he noticed plaintiff upset and nervous at work was insufficient to corroborate any alleged acts of cruelty.

Although the various county superior courts may have concurrent jurisdiction to adjudicate questions concerning divorce, the court which first assumes jurisdiction in the matter has jurisdiction to the exclusion of others. This was demonstrated in *Allen v. Superior Court of Maricopa County*[7] where petitioner was successful in obtaining a writ of prohibition since a similar action had previously been instituted in Cochise County.

Custody of Children.—The case of *In Re Johnson*[8] set forth the propositions that a court which has acquired jurisdiction of children has the statutory authority[9] to enter an order terminating the dependency status of such children and persons who had previously been awarded temporary custody are not entitled to appeal such order.

Joe W. Contreras

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1 347 P.2d 35 (Ariz. 1959).
2 347 P.2d 28 (Ariz. 1959); see also *Courts and Civil Procedure.*
3 Porter v. Stanford, *supra* note 1.
4 ARIZ. REV. STAT. §§ 25-315, 25-317 (1956).
5 Kemble v. Stanford, *supra* note 2.
6 86 Ariz. 201, 344 P.2d 161 (1959); see also *Evidence.*
7 86 Ariz. 205, 344 P.2d 163 (1959); see also *Courts and Civil Procedure.*
8 345 P.2d 423 (Ariz. 1959); see also *Courts and Civil Procedure.*
9 ARIZ. REV. STAT. § 8-233 (1956).

ELECTIONS

State Elector Contesting Primary Election.—The controversy in *Griffin v. Buzard*[1] arose out of Griffin's claim that the defendant had conspired with William A. (Bill) Brooks to enter the Democratic party primary and split the vote of William T. (Bill) Brooks. Griffin sought to have the defendant's nomination set aside and to have his name removed from the ballot at the general election. Our court reiterated that election contests are purely statutory, and further, under the Arizona statute[2] dealing with election contests, when an elector contends that the filing of a candidate is for the purpose of deceiving voters, he has stated a valid election contest.[3]

Parties to Election Contest.—In *Griffin v. Buzard*[4] the defendant contended that in an election contest the defeated candidate was a necessary party to the contest. The court, however, said that only the party whose nomination is contested need be a party to the action.

Conditions Precedent to General Election Contest.—After the 1958 general election was held, Griffin brought a further action against Buzard.[5] The basis of this action was the same as their primary election contest.[6] The court held that if nothing improper or irregular occurs after the primary election, a contest of the general election cannot be sustained on the grounds of an alleged offense against the elective franchise occurring prior to or during the primary election.

Joseph H. Worischeck

EVIDENCE

Competency of Witness.—Admission of the testimony of a witness coming under the Dead Man's Statute[1] as to transactions or statements

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[1] 86 Ariz. 166, 342 P.2d 201 (1959).
[2] ARIZ. REV. STAT. § 16-1201 (1956).
[3] On Feb. 24, 1960 the Maricopa County Superior Court ruled that Buzard should be replaced on the commission by William T. (Bill) Brooks. Arizona Daily Star, Feb. 27, 1960, § A, p. 3, col. 1. Buzard, on Feb. 26, 1960, appealed this ruling to the Supreme Court of Arizona.
[4] Griffin v. Buzard, *supra* note 1.
[5] Griffin v. Buzard, 86 Ariz. 174, 342 P.2d 206 (1959).
[6] Griffin v. Buzard, *supra* note 1.

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[1] ARIZ. REV. STAT. § 12-2251 (1956).

of a decedent was again held to be within the sound discretion of the trial court in *Goff v. Guyton.*[2] However, in a concurring opinion,[3] Justice Johnson noted that the rule of the majority of the court was derived from *Davey v. Janson*[4] wherein the Dead Man's Statute was interpreted as allowing the interested person's testimony with little or no corroboration. The better rule, he explained, is that the court should exercise its discretion in allowing a party to testify as an exception to that statute only when there has been prior corroborating testimony of independent witnesses relating to the transaction in issue.[5]

Refusal to admit the testimony of a six-year-old girl constituted reversible error in *Litzkuhn v. Clark* as the court stated that the competency of testimony by a child is in the discretion of the trial court provided, however, there has first been a voir dire examination. In addition the rule was reiterated that no offer of proof is required where evidence is excluded when the relevancy and materiality of that evidence is apparent.

Spontaneous Declaration.—A thirty minute time lapse was insufficient to preclude the admission of a police officer's testimony under the spontaneous utterance exception to the hearsay rule in *State v. Finley*[7] wherein a rape victim had related her entire story to the witness one-half hour after being released by her assailant. In that case the court also affirmed the admission of evidence of the prosecutrix' good moral character to rebut the inference raised by a defense of consent.

Confessions.—Confessions of the appellant's two co-defendants were admitted in *State v. Haley,*[8] the court stating that where evidence is admissible as to one of several defendants it generally must be received,

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[2] 346 P.2d 286 (Ariz. 1959); see also *Personal Property.*

[3] 346 P.2d at 288.

[4] 62 Ariz. 39, 153 P.2d 158 (1944).

[5] See also Stewart v. Schnepf, 62 Ariz. 440, 158 P.2d 529 (1945); Johnson v. Moilanen, 23 Ariz. 86, 201 Pac. 634 (1921); Goldman v. Sotelo, 7 Ariz. 23, 60 Pac. 696 (1900); Cox v. Williamson, 124 Mont. 512, 227 P.2d 614 (1951); Pincus v. Pincus' Estate, 95 Mont. 375, 26 P.2d 986 (1933); Wunderlich v. Holt, 86 Mont. 260, 283 Pac. 423 (1929); MCCORMICK, EVIDENCE § 72 (1954); 2 WIGMORE, EVIDENCE § 488, 575-80 (3d ed. 1940).

[6] 85 Ariz. 355, 339 P.2d 389 (1959); see also *Torts.* For further authority, see Keefe v. State, 50 Ariz. 293, 72 P.2d 425 (1937); People v. Delaney, 52 Cal. App. 765, 199 Pac. 896 (1921); ARIZ. REV. STAT. § 12-2202 (1956); MCCORMICK, EVIDENCE § 62 (1954); 2 WIGMORE, EVIDENCE § 505-09 (3d ed. 1940).

[7] 85 Ariz. 327, 338 P.2d 790 (1959), 2 ARIZ. L. REV. (1960); see also State v. McClain, 74 Ariz. 132, 245 P.2d 278 (1952); Keefe v. State, 50 Ariz. 293, 72 P.2d 425 (1937); Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104 (1908); Trimble v. Territory, 8 Ariz. 273, 71 Pac. 932 (1903); MCCORMICK, EVIDENCE § 272 (1954); 6 WIGMORE, EVIDENCE § 1767 (3d ed. 1940).

[8] 347 P.2d 692 (Ariz. 1959); see also *Attorney and Client, Constitutional Law,* and *Criminal Law and Procedure;* State v. Polan, 80 Ariz. 129, 293 P.2d 931 (1956); Cleaver v. U.S., 238 F.2d 766 (10th Cir. 1956).

and then it becomes the duty of the others to submit instructions to the trial court limiting its effect. The general rule, it observed, is that failure to request such a limiting instruction constitutes a waiver of any right to such an admonition.

Business Records.—Concerning the admission of records kept in the course of business, the court stated in *Builders Supply Corp. v. Shipley*[9] that the trial court has great discretion under the Arizona statute.[10]

Expert and Opinion Evidence.—While affirming the trial court's admission of a property owner's testimony concerning the value of his land the court, in *Board of Regents v. Cannon,*[11] again ruled that the competency of any person to testify on a given subject rests in the sound discretion of the lower court.

A corporation president's testimony regarding his company's indebtedness was inadmissible in *Sandia Development Corp. v. Allen*[12] as the court held opinion evidence upon the question of an indebtedness to be incompetent from one who is not an expert in the field of accounting.

Plaintiff's attorney propounded to a medical witness a long hypothetical question which was ruled admissible in *Yuma v. Evans,*[13] along with the answer thereto, when there is ample evidence of each of the factors upon which the question is based.

Impeachment of Witness.—Following the trial court's admission of a complaint filed by the plaintiff against a different defendant in a previous case, the court, in *Jiminez v. Starkey,*[14] observed that unless a pleading is either verified or the plaintiff is shown to have knowledge of its contents it is not properly admitted in evidence for impeachment purposes as long as the party has not gone to trial on the complaint.

To impeach a defendant by proof of character when he is a witness, the state may make inquiry to establish any previous felony convictions and, following an affirmative answer, further ask him the number of convictions, the nature of the crimes, and the places of their commission. If

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[9] 86 Ariz. 153, 341 P.2d 940 (1959); see also *Contracts* and *Courts and Civil Procedure;* McCormick, Evidence § 289 (1954).

[10] Ariz. Rev. Stat. § 12-2202 (1956).

[11] 86 Ariz. 176, 342 P.2d 207 (1959); see also *Real Property;* McCormick, Evidence § 13 (1954).

[12] 86 Ariz. 40, 340 P.2d 193 (1959); see also *Creditors' Rights* and *Private Corporations;* McCormick, Evidence § 13 (1954).

[13] 85 Ariz. 221, 336 P.2d 135 (1959); see also *Courts and Civil Procedure, Municipal Corporations,* and *Torts;* McCormick, Evidence §§ 14, 16 (1954).

[14] 85 Ariz. 194, 335 P.2d 83 (1959); see also *Courts and Civil Procedure* and *Torts;* Christensen v. Trotter, 171 F.2d 66 (9th Cir. 1948).

the defendant answers correctly, according to *State v. Sorell*,[15] it is error to admit any further evidence of former convictions.

Plaintiff's counsel declared surprise at the testimony of his own witness which was apparently different from that he had given in a deposition in the case of *Anderson v. City Van & Storage Co.*[16] It was held to be error not to permit counsel to cross-examine the witness since he was not trying to impeach him, but merely trying to refresh his memory. In the same case plaintiff's attorney offered into evidence a photo of a woodpile which was not destroyed by the fire, and the court ruled it was properly rejected as documentary evidence, the admission of which is in the sound discretion of the trial court.

Corroboration.—Testimony of a husband's fellow employee was deemed insufficient corroboration under an Arizona divorce statute[17] in *Williams v. Williams*[18] since the witness saw only results of the wife's alleged cruelty rather than the cruel acts themselves.

Judicial Notice.—It is common knowledge that the expanding economy of the valley areas of central and southern Arizona is due in large part to the widespread use of refrigeration systems, the court stated in *Voight v. Ott*,[19] while noting that it is almost universal that no new residence property in the Phoenix area can be sold without one or the other of the two general methods of cooling.

During the year it was again ruled that judicial notice may be taken of the regulations of administrative agencies, *Climate Control, Inc. v. Hill*;[20] and of public statutes, *Mercer v. Vinson*.[21]

Presumptions.—The well known rule that a presumption disappears upon the receipt of contradictory evidence was repeated in *State Tax Comm'n v. Graybar*[22] and *Helton v. Industrial Comm'n*.[23] The court fur-

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[15] 85 Ariz. 173, 333 P.2d 1081 (1959); see also *Courts and Civil Procedure* and *Criminal Law and Procedure;* State v. Polan, 78 Ariz. 253, 278 P.2d 532 (1954); Hadley v. State, 25 Ariz. 23, 212 Pac. 458 (1923); West v. State, 24 Ariz. 237, 208 Pac. 412 (1922); MCCORMICK, EVIDENCE § 43 (1954).

[16] 86 Ariz. 58, 340 P.2d 566 (1959).

[17] ARIZ. REV. STAT. § 25-317(b) (1956).

[18] 344 P.2d 161 (Ariz. 1959); see also *Domestic Relations.*

[19] 86 Ariz. 128, 341 P.2d 923 (1959); see also *Contracts* and *Real Property;* MCCORMICK, EVIDENCE § 324 (1954).

[20] 86 Ariz. 180, 342 P.2d 854 (1959); see also *Administrative Law* and *Workmen's Compensation;* MCCORMICK, EVIDENCE § 326 (1954).

[21] 85 Ariz. 280, 336 P.2d 854 (1959); see also *Partnerships* and *Torts;* MCCORMICK, EVIDENCE § 326 (1954).

[22] 344 P.2d 1008 (Ariz. 1959); see also *Taxation;* MCCORMICK, EVIDENCE § 311 (1954).

[23] 85 Ariz. 276, 336 P.2d 852 (1959); see also *Workmen's Compensation;* MCCORMICK, EVIDENCE § 311 (1954).

ther observed, in the latter case, that the presumption vanishes in the light of evidence which would allow a reasonable mind to infer to the contrary.

Lee Esch

INSURANCE

Insuring a Governmental Agency.—In *State v. Northwestern Mut. Ins. Co.*[1] the court was called upon to construe a constitutional provision[2] forbidding state agencies from becoming shareholders in private corporations, and a statute[3] authorizing such agencies of the state to become members of mutual insurance companies. In holding that a non-assessable *mutual* insurance policy purchased by the state was constitutional, the court reasoned that no ownership interest was granted to the state agency by virtue of the policy.

Regulation of Premiums.—The posting of a surety bond was held to be a contract of insurance under Arizona law in *Commercial Standard Ins. Co. v. Cleveland.*[4] In construing three statutes[5] together, it was determined that an attempt to collect a bond fee in addition to a regular premium on the bond should fail due to legislative act forbidding such additional charges. An agreement to pay such a fee was therefore void and unenforceable.[6]

Lee R. Perry

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[1] 86 Ariz. 50, 340 P.2d 200 (1959). This is a case of first impression in Arizona. *Accord,* Clifton v. School Dist. No. 14, 192 Ark. 140, 90 S.W.2d 508 (1936); Miller v. Johnson, 4 Cal. 2d 265, 48 P.2d 956 (1935); City of Macon v. Benson, 174 Ga. 502, 166 S.E. 26 (1932); Louisville Bd. of Ins. Agents v. Jefferson County, 309 S.W.2d 40 (Ky. 1957); McMahon v. Cooney, 95 Mont. 138, 25 P.2d 131 (1933); French v. Mayor of the City of Millville, 66 N.J.L. 392, 49 Atl. 465 (1901); Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935); Johnson v. School Dist. No. 1 of Multnomah County, 128 Ore. 9, 270 Pac. 764 (1928); Downing v. School Dist. of the City of Erie, 297 Pa. 474, 147 Atl. 239 (1929); Burton v. School Dist. No. 19, 47 Wyo. 462, 38 P.2d 610 (1934). *Contra,* Lewis v. Indep. School Dist. of the City of Austin, 139 Tex. 83, 161 S.W.2d 450 (1942).

[2] ARIZ. CONST. art. 9 § 7.

[3] ARIZ. REV. STAT. § 20-715(b) (1956).

[4] 345 P.2d 210 (Ariz. 1959). For a general discussion see VANCE, INSURANCE §§ 1, 5, 10, 197 (3d ed. 1951); see also *Contracts* and *Courts and Civil Procedure.*

[5] A.C.A. 1939 §§ 61-341, 61-344, 61-801. Repealed, Ariz. Sess. Laws 1954, ch. 64, art. 29, § 1.

[6] The court was careful to note that this case, due to statutory restriction, was distinguishable from *S.H. Kress & Co. v. Cleveland,* 345 P.2d 210, 214 (Ariz. 1959) *(dictum).*

LABOR LAW

Available for Work.—Claimants refused to cross a picket line at their work locations on the premises of an employer whose employees were involved in a labor dispute in *Vickers v. Western Elec. Co.*[1] The court affirmed the superior court's denial of unemployment compensation, holding that the burden of proof, by a fair preponderance of the evidence, of availability for work is on the claimant.[2]

Contract Interpretation.—In *Mountain States Tel. & Tel. Co. v. Vickers*[3] union employees went on strike over alleged violations by the company of seniority and transfer provisions of contracts between the union and the company. The court, in denying unemployment compensation to the striking employees, stated that it is well settled that in the absence of clear and unambiguous contract provisions limiting the authority of management, an employer is free to make work assignments unilaterally and with consent or approval of the union.[4]

Edward Leigh Larson

MUNICIPAL CORPORATIONS

Legislative Supremacy.—Both *Robinson v. Police Pension Bd.*,[1] and *Switzer v. City of Phoenix*,[2] held void attempts by a city council to bind the state legislature. In the *Robinson* case[3] the court held that the legislature has the power to make reasonable modifications and changes in all laws operative on a state-wide basis,[4] notwithstanding the municipal administration of such laws.[5] In the *Switzer* decision, the court stated that to the extent that a resolution purports to require the continuance of

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[1] 86 Ariz. 7, 339 P.2d 1033 (1959). See companion case, Vickers v. Am. Tel & Tel. Co., 86 Ariz. 13, 339 P.2d 1037 (1959); see also *Administrative Law.*

[2] ARIZ. REV. STAT. § 23-771(3) (1956); *But see* Beaman v. Safeway Stores, 78 Ariz. 195, 277 P.2d 1010 (1954), discussed in Annot., 56 A.L.R.2d 1015, 1020 (1957).

[3] 86 Ariz. 1, 339 P.2d 1029 (1959).

[4] For a general discussion of rules of construction of collective bargaining agreements, see 1 WERNE, LAW & PRACTICE OF THE LABOR CONTRACT § 6.30 (1957).

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[1] 85 Ariz. 384, 339 P.2d 739 (1959); see *Constitutional Law.*

[2] 86 Ariz. 121, 341 P.2d 427 (1959); see *Administrative Law,* and *Constitutional Law.*

[3] For a companion case, see Police Pension Bd. v. Denney, 84 Ariz. 394, 330 P.2d 1 (1958).

[4] ARIZ. REV. STAT. § 9-912 (1956).

[5] ARIZ. REV. STAT. § 9-913 (1956); see also Sweesy v. Los Angeles County Peace Officer's Ret. Bd., 17 Cal. 2d 356, 110 P.2d 37 (1941).

all laws without modification, it is a usurpation of the legislative function of the people of the state.

Responsibility in Tort.—The supreme court held in *City of Yuma v. Evans*,[6] that a city acting in the capacity of landlord[7] shall be liable to tenants for injuries resulting from the city's negligence when such injuries occurred while the injured party was using the leased premises as was intended or permitted, and so long as the city had knowledge, or should have had under the circumstances, of the alleged defects in the premises.

Contract Authority.—In the much litigated[8] and finally decided case of *City of Phoenix v. Linsenmeyer*,[9] in which the lease contract between the city and the property owner provided that certain portions of pipes installed should become the property of the lessor upon termination of the lease, the provision was held as much a part of the consideration for the lease as the payment per month provided for. The court stated that the city's contract authority through its manager extended to and provided for payment of adequate consideration, and that the defense of ultra vires is an affirmative one which is not put in issue unless properly pleaded.[10]

Lawmaking Function.—It is the duty of the city to include the necessary funds in the budget to provide for salary increases set forth in valid ordinances,[11] and failure to do so shall not render the requirements of the ordinance inoperative. The court reiterated this recently in *Parrack v. City of Phoenix*,[12] in which it held that one shall not be estopped from claiming a salary increase merely because he failed to challenge the sum allocated by the city council for the payment of salaries.[13]

The court stated emphatically in *Hart v. Bayless Inv. & Trading Co.*,[14] that the requisites set forth by the legislature, requiring hearings

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[6] 85 Ariz. 229, 336 P.2d 135 (1959); see *Courts and Civil Procedure, Evidence,* and *Torts.*

[7] 18 McQUILLAN, MUNICIPAL CORP. 185, 385 (3d ed. 1950); see also HARPER, TORTS, 295 (1938), and PROSSER, TORTS §§ 80, 109 (2d ed. 1955).

[8] City of Phoenix v. Linsenmeyer, 78 Ariz. 378, 280 P.2d 698 (1955), and City of Phoenix v. Super. Ct. of Maricopa County, 65 Ariz. 139, 175 P.2d 811 (1946).

[9] 86 Ariz. 328, 346 P.2d 140 (1959); see *Courts and Civil Procedure.*

[10] City of Yuma v. Evans, *supra* note 6; see also Ariz. Life Ins. Co. v. Lindell, 15 Ariz. 471, 140 Pac. 60 (1914), and *Courts and Civil Procedure.*

[11] ARIZ. REV. STAT. §§ 42-304, 42-308 (1956).

[12] 86 Ariz. 88, 340 P.2d 997 (1959).

[13] State *ex rel.* Pike v. City of Bellingham, 183 Wash. 439, 48 P.2d 602 (1935).

[14] 86 Ariz. 379, 346 P.2d 1101 (1959); see also *Administrative Law, Constitutional Law,* and *Courts and Civil Procedure.*

and specific notice thereof prior to any action by zoning commissions and boards of supervisors of municipalities, will be considered mandatory and must be strictly complied with before such action taken shall have effect.[15]

Lewis C. Murphy

PARTNERSHIP

Joint Adventure.—In reversing the trial court in *Mercer v. Vinson*[1] the court held that unless it can be said as a matter of law that the parties were not engaged in a joint adventure, the question must be submitted to the jury. The dissent[2] noted a lack of the element of joint profit and cited a 1958 Arizona case[3] which had recognized this as necessary.[4]

Dissolution.—In *Hurst v. Hurst*[5] a judgment awarding "living and managerial expenses" to a partner was reversed for a new trial since the record was not clear whether the award was for business expenses[6] or for compensation. The court held that under the statutory rule[7] in the absence of an agreement express or implied a partner is not entitled to remuneration for acting in the partnership business.[8] The court also decided that under the statute[9] allowing a partner to elect interest for or profits from a post-dissolution use of his share of the assets, he might

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[15] ARIZ. REV. STAT. §§ 11-801 to -830; 11-802, 11-808 (1956); see Wood v. Town of Avondale, 72 Ariz. 217, 232 P.2d 963 (1951), and Kubby v. Hammond, 68 Ariz. 17, 198 P.2d 134 (1948).

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[1] 85 Ariz. 280, 336 P.2d 854 (1959); see also *Torts* and *Evidence*. By way of dictum the court stated that as between the parties intent to form a partnership is a necessary element, but as to third persons the relation will be determined from the facts. *Id.* at 287, 336 P.2d at 859. *Cf.* ARIZ. REV. STAT. § 29-216 (1956).

[2] 85 Ariz. 280, 288, 336 P.2d 854, 860 (1959) (dissenting opinion).

[3] Ariz. Pub. Serv. Co. v. Lamb, 84 Ariz. 314, 327 P.2d 998 (1958).

[4] See Fedderson v. Goode, 112 Colo. 38, 145 P.2d 981 (1944); Moon v. Ervin, 64 Idaho 464, 133 P.2d 933 (1943); Commercial Lumber Co. v. Nelson, 181 Okla. 122, 72 P.2d 829 (1937).

[5] 86 Ariz. 242, 344 P.2d 1001 (1959); see also *Courts and Civil Procedure*.

[6] See ARIZ. REV. STAT. § 29-218(2) (1956); UNIFORM PARTNERSHIP ACT § 18(b).

[7] ARIZ. REV. STAT. § 29-218(6) (1956). This is identical to the UNIFORM PARTNERSHIP ACT § 18(f) which is declaratory of the common law. Bach v. Bach, 373 Ill. 442, 26 N.E.2d 858 (1940).

[8] See Kirkpatrick v. Christensen, 68 Ariz. 364, 206 P.2d 577 (1949); Boyer v. Bowles, 310 Mass. 134, 37 N.E.2d 489 (1941); Levy v. Leavitt, 257 N.Y. 461, 178 N.E. 758 (1931); Neilsen v. Holmes, 82 Cal. App. 2d 197, 186 P.2d 197 (1947); CRANE, PARTNERSHIP § 65(c) (2d ed. 1952).

[9] ARIZ. REV. STAT. § 29-242 (1956); UNIFORM PARTNERSHIP ACT § 42. See Mosely v. Mosely, 196 F.2d 663 (9th Cir. 1952); Vangel v. Vangel, 45 Cal. 2d 804, 291 P.2d 25 (1953).

not elect to receive interest for one year and a share of the profits for the balance of the period.

Robert B. Buchanan

PERSONAL PROPERTY

Gifts.—The rule[1] that the essential elements of a gift inter vivos are that the donor manifest a clear intent to give to a party claiming as donee and that he give to the latter, before death, full possession and control of the property was reiterated in *Goff v. Guyton.*[2]

Theodore Pedersen

PRIVATE CORPORATIONS

Foreign Corporations.—The court affirmed the proposition in *Sandia Dev. Corp. v. Allen,*[1] that contracts entered into within the state by non-qualifying foreign corporations[2] which have been fully executed will probably not be undone by the courts, particularly where the interests of third parties have become vested thereunder.[3]

Lewis C. Murphy

PUBLIC UTILITIES

Rate Bases and Rates of Return.—A reasonable judgment concerning *all* relevant factors is required by the Corporation Commission in determining the fair value of water utility properties for the purpose of

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[1] McNabb v. Fisher, 38 Ariz. 288, 299 Pac. 679 (1931); BROWN, PERSONAL PROPERTY §§ 37-65 (2d ed. 1955).
[2] 346 P.2d 286 (Ariz. 1959); see also *Evidence.*

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[1] 86 Ariz. 40, 340 P.2d 193 (1959); see also *Creditor's Rights* and *Evidence.*
[2] ARIZ. REV. STAT. §§ 10-481 to -485 (1956).
[3] 17 FLETCHER, PRIVATE CORP. § 8527 (perm. ed. 1933).

fixing rate bases and rates of return.[1] The court reiterated this proposition recently in *Arizona Corp. Comm'n v. Arizona Water Co.*,[2] in which it stated that while a utility is not entitled to a fair return on its investment, it is entitled to a fair return on the fair value of its properties devoted to the public use at the time of the inquiry by the commission.[3] Thus a finding by the Corporation Commission that the fair value for determining rates of return was the purchase price of the property was held to be arbitrary and improper.

Cooperatives.—The supreme court's interpretation of the Arizona Constitution[4] in *Trico Elec. Coop. v. Corp. Comm'n.*,[5] clearly indicates that a cooperative public service corporation is subject to the jurisdiction of the Corporation Commission. In determining the extent of the commission's jurisdiction over Trico, the court stated that while duplication of services by utilities is prohibited,[6] any attempt by the commission to require a cooperative public service corporation to serve other than its members would be ultra vires and void since a cooperative is by its nature limited to the service of its members only.[7]

Lewis C. Murphy

REAL PROPERTY

Eminent Domain.—In *State v. Jay Six Cattle Co.*,[1] a case involving the condemnation of real property, it was held that by payment of damages to the court, the state does not thereby waive any right of review.

Another case concerning damages, *State ex rel. Morrison v. Thelberg*,[2] reiterated the principle that an abutting property owner is not entitled to damages for loss of his direct access to a public highway

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[1] Simms v. Round Valley Lt. & Pwr. Co., 80 Ariz. 145, 294 P.2d 378 (1956); see ARIZ. CONST. art 15, § 14.
[2] 85 Ariz. 198, 335 P.2d 412 (1959).
[3] ARIZ. REV. STAT. 40-201 to -204 (1956); see note 1 *supra*.
[4] ARIZ. CONST. art 15, §§ 2,3.
[5] 86 Ariz. 27, 339 P.2d 1046 (1959), and companion case, Trico Elec. Coop. v. Ralston, 67 Ariz. 358, 196 P.2d 470 (1948).
[6] ARIZ. REV. STAT. § 10-772 (1956).
[7] The ultra vires natures of a corporation's activities beyond the scope of its articles of incorporation was pointed out in Central Trans. Co. v. Pullman's Palace Car Co., 139 U.S. 24 (1891), and was adopted by the Arizona Supreme Court in McQueen v. First Nat'l. Bank, 36 Ariz. 74, 283 Pac. 273 (1929).

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[1] 85 Ariz. 220, 335 P.2d 799 (1959); see also *Constitutional Law*.
[2] 344 P.2d 1015 (Ariz. 1959).

caused by the state changing the grade. But this holding and applicable parts of precedent cases[3] were overruled upon rehearing in April 1960.[4] Thus, the state must now compensate for loss of access caused by change of grade, which is in accord with the statutory mandate that cities and towns do so.[5]

With regard to damages generally, the court held in *Board of Regents v. Cannon*[6] consistent with the well established principle that in condemnation proceedings a verdict not supported by substantial evidence cannot stand.[7]

A first impression question was treated in *State ex rel. Morrison v. Helm*[8] in which the court strictly construed the statute that specifies when title to condemned land will vest in the plaintiff.[9] The court held that where the trial court had apportioned damages between the fee interest and the leasehold interest, the state may abandon proceedings as to either interest at any time before recording of the final order of condemnation. It was also held that the abandonment of a condemnation proceeding by the state does not give the defendant a right to damages unless the state was not diligent in the prosecution of the proceedings.

The lower court was reversed in *Gilbert v. State*[10] in which it was held reversible error for the state not to pay for improvements on condemned land because improvements were to be removed by lessee according to agreement between lessor and lessee.[11] The state could not have the benefit of a contract to which it was not a party.

Fixtures.—According to *Voight v. Ott*,[12] air conditioning equipment, either refrigerative or evaporative, fully complies with the requirement of adaptability in order to change its character from personalty to a fixture upon being affixed to realty when intent is silent.

Trespass.—In a suit for trespass to land, it was held in *Mikol v. Vla-*

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[3] *In re* Forsstrom, 44 Ariz. 472, 38 P.2d 878 (1934); Grande v. Casson, 50 Ariz. 397, 72 P.2d 676 (1937).

[4] 350 P.2d 988 (Ariz. 1960).

[5] "No street or sidewalk grade shall be altered after it has once been established and built unless compensation is made to abutting owners for damages done their property by the change." ARIZ. REV. STAT. § 9-276(a)(22).

[6] 342 P.2d 207 (Ariz. 1959); see also *Evidence.*

[7] Maricopa County v. Shell Oil Co., 84 Ariz. 325, 327 P.2d 1005 (1958); State *ex rel.* Sullivan v. Carrow, 57 Ariz. 434, 114 P.2d 896 (1941).

[8] 345 P.2d 202 (Ariz. 1959).

[9] "When the final judgment has been satisfied, the court shall make a final order of condemnation, describing the property condemned and the purposes of the condemnation. (b) A copy of the order shall be filed in the office of the county recorder of the county or counties in which the property is located, and thereupon the property described shall vest in plaintiff for the purposes therein specified." ARIZ. REV. STAT. § 12-1126(a) (1956).

[10] 85 Ariz. 321, 338 P.2d 787 (1959).

[11] See, *e.g.*, 1 AMERICAN LAW OF PROPERTY §§ 3.54, 3.55 (Casner ed. 1952).

[12] 86 Ariz. 128, 341 P.2d 923 (1959); see also *Contracts* and *Evidence.*

hopoulos[13] that in the absence of the defendant showing a different measure of damages which would be less, the plaintiff's measure of damages was properly the difference in market value of the land immediately before and immediately after the injury.

Temporary Injunction.—In *Firchau v. Barringer Crater Co.*[14] the statute restricting the court's power to interfere with the working of a lode or mining claim[15] was held not to be applicable where the trial court, having reasonable doubt as to the validity of a contract to mine property, issued a temporary injunction pendente lite.

Quiet Title Actions.—In another decision on mining law concerning a dispute over rights to placer mining claims on unappropriated government land, *Rundle v. Republic Cement Corp.*[16] held that the defendant was not entitled to raise the issue of fraud, because this was a defense available only to the government as fee owner of the unappropriated land.[17]

Theodore Pedersen

TAXATION

Construction of Statute.—Words of a taxing statute, stated the court in *State Tax Comm'n v. Staggs Realty Co.*,[1] will be read to gain their fair meaning, but not to gather new objects of taxation by strained construction or implication. The case further ruled that a definition of a word set forth in a licensing statute cannot be applied to the same word

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[13] 86 Ariz. 93, 340 P.2d 1000 (1959).

[14] 344 P.2d 486 (Ariz. 1959).

[15] "An injunction against the working and mining of a lode or mining claim shall not be granted without notice to the opposite party, and no preliminary injunction or temporary restraining order shall be issued to prevent the working or mining pending hearing of the application for the injunction." ARIZ. REV. STAT. § 12-1807 (1956).

[16] 86 Ariz. 96, 341 P.2d 226 (1959).

[17] By way of dictum in Rundle v. Republic Cement Corp., 86 Ariz. at ....., 341 P.2d at 226, the court cites Saxman v. Christman, 52 Ariz. 149, 79 P.2d 520 (1938) as being erroneous; but it appears that the holding and dicta of the *Rundle* case are consistent with the holding and dicta of the *Saxman* case.

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[1] 85 Ariz. 294, 337 P.2d 281 (1959). For other Arizona cases, see State Tax Comm'n v. Wallapai Brick & Clay Prod., Inc., 85 Ariz. 23, 330 P.2d 988 (1958); Moore v. Smotkin, 79 Ariz. 77, 283 P.2d 1029 (1955); State Tax Comm'n v. Miami Copper Co., 74 Ariz. 234, 246 P.2d 871 (1952); Corp. Comm'n v. Equitable Life Assur. Soc., 73 Ariz. 171, 239 P.2d 360 (1951); Alvord v. State Tax Comm'n, 69 Ariz. 287, 213 P.2d 363 (1950).

as used in a taxing statute.[2]

Laws exempting property from taxation are to be strictly construed, according to *State Tax Comm'n v. Graybar*,[3] and the presumption is always against the exemption.[4]

Lee Esch

TORTS

Elements of Negligence.—In *Nieman v. Jacobs*[1] our court again, as in the past, told a plaintiff that if he would go to the jury he must show the existence of a duty owed by the defendant to him, a breach of that duty, and an injury proximately caused by such breach.[2] The plaintiff, in attempting to prove proximate cause, relied on the doctrine of res ipsa loquitur, but the Supreme Court of Arizona held that res ipsa merely furnishes the elements of negligence, not proximate cause.[3]

When Does Cause of Action Arise.—In *Golfinos v. Southern Pacific Co.*[4] it was held that merely because a railroad car is sitting across the highway creating a "blocked crossing" does not in itself remove any negligence on the part of the railroad when a motorist collides with the train. Concerning this problem each case must be decided according to its particular facts. The court did add, however, that the "blocked crossing" rule does not apply in Arizona.[5]

Standard of Care.—Our court in *City of Yuma v. Evans*[6] held that when a landlord maintains electrical wiring in or proximate to a place where children habitually congregate, and the landlord knows this fact

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[2] Moore v. Smotkin, 79 Ariz. 77, 79, 283 P.2d 1029, 1030 (1955) was relied upon by the court in so holding.
[3] 86 Ariz. 253, 344 P.2d 1008 (1959); see also *Evidence.*
[4] See also Phoenix v. Bowles, 65 Ariz. 315, 180 P.2d 222 (1947).

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[1] 347 P.2d 702 (Ariz. 1959).
[2] RESTATEMENT, TORTS § 281 (1934); see also Krysiak v. Acme Wire Co., 169 F. Supp. 576 (N.D. Ohio 1959); Dungan v. Brandenberg, 72 Ariz. 47, 230 P.2d 518 (1951); Stewart v. Crystal Coca-Cola Bottling Co., 50 Ariz. 60, 68 P.2d 952 (1937); Rafferty v. Northern Utilities Co., 73 Wyo. 278, 278 P.2d 605 (1955).
[3] PROSSER, TORTS § 36 (2d ed. 1955).
[4] 345 P.2d 780 (Ariz. 1959); see also *Courts and Civil Procedure;* So. Pac. v. Mitchell, 80 Ariz. 50, 292 P.2d 827 (1956); Peagler v. Atl. C. L. Ry., 234 S.C. 140, 107 S.E.2d 15 (1959); RESTATEMENT, TORTS § 433 (1934).
[5] *Id.* at 782.
[6] 85 Ariz. 229, 336 P.2d 135 (1959); see also *Courts and Civil Procedure, Evidence,* and *Municipal Corporations; accord,* RESTATEMENT, TORTS § 343 (1934); *c.f.* PROSSER, TORTS § 80 (2d ed. 1955). For other Arizona cases see, *e.g.,* Pacific Employers Ins. Co. v. Morris, 78 Ariz. 24, 275 P.2d 389 (1954); Crouse v. Wilbur-Ellis Co., 77 Ariz. 359, 272 P.2d 352 (1954).

or should know it, he must exercise a *high degree* of care in guarding or maintaining such wires so that they will not cause injury to the children. But in *Vickers v. Gercke*[7] it was held that only reasonable care is required of a master to provide his servant with a safe place to work.

Violation of Statute.—In *Mercer v. Vinson*[8] the court held that if a state statute[9] is remedial in character it should be given a liberal construction. Further, if the statute is enacted for public safety, and it provides that a certain thing be done or not done, and if a failure to comply with the statute is the proximate cause of injury,[10] this is negligence per se. In another case[11] a federal statute[12] was brought in to question. The court said that when the statute does not define negligence, the Arizona court will be mindful of decisions of the United States Supreme Court as to what constitutes negligence. These decisions are controlled by common-law principles and federal decisional law formulating and applying the concept.

Duty to Act.—In *West v. Soto*[13] the court held that a passenger in an automobile which is driven by a drunk driver owes no duty as to third persons and is under no duty to act, that is the passenger is under no duty to ride in a car driven by a sober person. However, the court did feel that, between the driver and passenger, the passenger may be guilty of contributory negligence.[14] This duty to act problem also appeared in *Hoge v. Southern Pacific Co.*[15] There the court held that if an employee is familiar with his work and knows and appreciates the normal risks and hazards which attend it, the employer is not required to take steps to protect him against such risks and hazards.

In *Olsen v. Macy*[16] the court held that if a land owner permits persons generally to use a way across his land under circumstances which leads the people to believe that the way is a public way, the landowner

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[7] 86 Ariz. 75, 340 P.2d 987 (1959); see also *Agency* and *Courts and Civil Procedure; accord,* PROSSER, TORTS § 67 (2d ed. 1955).

[8] 85 Ariz. 280, 336 P.2d 854 (1959); see also *Evidence* and *Partnership.* For other Arizona cases see, *e.g.,* Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Salt River Valley Users' Ass'n. v. Compton, 39 Ariz. 491, 8 P.2d 249 (1932).

[9] ARIZ. REV. STAT. § 36-1623 (1956).

[10] RESTATEMENT, TORTS § 286 (1934); PROSSER, TORTS § 34 (2d ed. 1955).

[11] So. Pac. Co. v. Hendricks, 85 Ariz. 373, 339 P.2d 731 (1959); see also *Agency.*

[12] Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C.A. § 51 (1952).

[13] 85 Ariz. 255, 336 P.2d 153 (1959); see PROSSER, TORTS § 36 (2d. ed. 1955); *c.f.* HARPER, TORTS § 68 (1938). For other Arizona cases see, *e.g.,* Salt River Valley Water Users' Ass'n. v. Delaney, 44 Ariz. 544, 39 P.2d 625 (1934); Salt River Valley Water Users' Ass'n. v. Compton, 39 Ariz. 491, 11 P.2d 839 (1932).

[14] *Id.* at 259, 336 P.2d at 155; RESTATEMENT, TORTS § 463 (1934).

[15] 85 Ariz. 361, 339 P.2d 393 (1959); see also *Agency;* Tiller v. Atl. C. L. Ry. 318 U.S. 54 (1943); PROSSER, TORTS § 67 (2d ed. 1955).

[16] 86 Ariz. 72, 340 P.2d 985 (1959); *accord,* PROSSER, TORTS § 77 (2d. ed. 1955); see, *e.g.,* Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942); Chronopoulos v. Gil Wyner Co., 334 Mass. 593, 137 N.E.2d 667 (1956); Nolin v. Bridgeton & Millville Traction Co., 74 N.J.L. 559, 65 Atl. 992 (1907).

owes to those persons the same duty which he owes to persons who come upon his premises by invitation.[17]

Imputed Contributory Negligence.—In 1959, the Arizona supreme court was faced on two occasions with the problem of imputed negligence. In *Jimenez v. Starkey*[18] and *Michie v. Calhoun*[19] the court held that the negligence of the father, who is the driver of the automobile, cannot be imputed to his minor child, passenger, if the action is for the wrongful death of the child. In the *Michie*[20] case, however, the action was also for the wrongful death of the driver. As to this portion of the case the court held that if the action is for wrongful death[21] the negligence of the decedent driver is imputed to the plaintiff.

Negligence—A Jury Question.—In *Figueroa v. Majors*[22] the superior court had directed a verdict for the defendant on the grounds that the plaintiff had not proven any negligence on the part of the defendants. The supreme court held that when in the trial court there is conflicting evidence from which reasonable men can draw different conclusions, the question of negligence is a fact question to be determined by the trier of fact.

Acts Which Constitute Conversion.—In *Shartzer v. Ulmer*[23] the court relied on a California decision[24] in determining what acts constitute conversion. The court held that any act of dominion wrongfully exercised over the personal property of another, in denial of or inconsistent with the other person's rights, is conversion.

Basis of Liability for Misrepresentation.—When the Poley ranch was put up for sale the owner informed would-be buyers that the water supply on the ranch was good, sufficient, and proper. The purchaser of the ranch

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[17] RESTATEMENT, TORTS § 367 (1934).

[18] 85 Ariz. 194, 335 P.2d 83 (1959); see also *Courts and Civil Procedure* and *Evidence; accord,* RESTATEMENT, TORTS § 488 (1934); PROSSER, TORTS § 54 (2d. ed. 1955).

[19] 85 Ariz. 270, 336 P.2d 370 (1959); see also *Courts and Civil Procedure; accord,* RESTATEMENT, TORTS § 488 (1934); PROSSER, TORTS § 54 (2d ed. 1955). For other Arizona cases see, *e.g.,* Womack v. Preach, 64 Ariz. 61, 165 P.2d 657 (1946); Town of Flagstaff v. Gomez, 23 Ariz. 184, 202 Pac. 401, 23 A.L.R. 661 (1921).

[20] *Ibid.; c.f.* PROSSER, TORTS § 51 (2d. ed. 1955).

[21] ARIZ. REV. STAT. §§ 12-611, 12-612, 12-613 (1956).

[22] 85 Ariz. 345, 338 P.2d 803 (1959); see also *Agency* and *Courts and Civil Procedure.* For other Arizona cases see, *e.g.,* Cope v. So. Pac. R.R., 66 Ariz. 197, 185 P.2d 772 (1947); Durham v. Firestone Tire & Rubber Co. of Cal., 47 Ariz. 280, 55 P.2d 648 (1936).

[23] 85 Ariz. 179, 333 P.2d 1084 (1959); see also *Creditor's Rights; accord,* PROSSER, TORTS § 15 (2d ed. 1955); RESTATEMENT, TORTS § 223 (1934).

[24] 54 Cal. App. 2d 466, 129 P.2d 159 (1942).

found that there was not sufficient water for his purposes and he brought an action for misrepresentation.[25] The court held that a statement of opinion is not fraud, and further when the action is for fraud, all nine elements of fraud must be proved.[26]

Defense to Dog Bite Actions.—In *Litzkuhn v. Clark*[27] the plaintiff was injured while protecting her small dog from defendant's large dog. The court held that in Arizona, the only defense to a dog bite action is provocation. If the plaintiff is only protecting his property this is not provocation. This action was based on the Arizona dog bite statutes.[28]

Venue When Action Based on Slander.—Sulger v. Superior Court[29] was an original proceeding based on the Arizona venue statute.[30] The court had to determine whether slander comes within the definition of trespass as used in that statute. The court held that the foundation of an action for slander is trespass, and therefore the action may be brought in the county in which the trespass was committed or in the county in which the defendant resides or may be found.

Interpretation of Statute.—In one case[31] this past year the court had to give meaning to the term "unlawful" act as found in the state bonding statute.[32] The court held that the term "unlawful act" does not necessarily mean a criminal act; it means a wrongful act, or a tort (any wrongful act [not involving a breach of contract] for which a civil action will lie).

Joseph H. Worischeck

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[25] Poley v. Bender, 347 P.2d 696 (Ariz. 1959); see also *Courts and Civil Procedure;* PROSSER, TORTS §§ 87, 89, 90 (2d. ed. 1955); *but see* RESTATEMENT, TORTS § 539 (1934). For other Arizona cases see, *e.g.*, Wilson v. Byrd, 79 Ariz. 302, 288 P.2d 1079 (1955); Koen v. Cavanagh, 70 Ariz. 389, 222 P.2d 630 (1950); Rice v. Tissaw, 57 Ariz. 230, 112 P.2d 866 (1941); Waddell v. White, 56 Ariz. 420, 108 P.2d 565 (1940).

[26] *Id.* at 698. The nine elements as found in 37 C.J.S. *Fraud* § 3 (1943) and as used in Arizona are: (1) A representation. (2) Its falsity. (3) Its materiality. (4) The speaker's knowledge of its falsity or ignorance of its truth. (5) His intent that it should be acted on by the person and in the manner reasonably contemplated. (6) The hearer's ignorance of its falsity. (7) His reliance on its truth. (8) His right to rely thereon. (9) And his consequent and proximate injury.

[27] 85 Ariz. 355, 339 P.2d 389 (1959); see also *Evidence; cf.* RESTATEMENT, TORTS § 518 (1934).

[28] ARIZ. REV. STAT. §§ 24-521, 24-522, 24-523, 24-524 (1956).

[29] 85 Ariz. 299, 337 P.2d 285 (1959); see also *Courts and Civil Procedure;* Cox v. Strickland, 120 Ga. 104, 47 S.E. 912 (1904); Crespi v. Wigley, 18 S.W.2d 716 (Tex. Civ. App. 1929); *accord,* 33 AM. JUR. LIBEL AND SLANDER § 224 (1941); 53 C.J.S. *Libel and Slander* § 152 (1948).

[30] ARIZ. REV. STAT. § 12-401 (1956).

[31] Phoenix Auto Auction Inc. v. State Auto Ins. Ass'n., 346 P.2d 146 (Ariz. 1959).

[32] ARIZ. REV. STAT. § 28-1305 (1956).

TRUSTS

Constructive Trusts.—Consistent with earlier decisions,[1] it was ruled in *Smith v. Conner*[2] that to justify imposition of a constructive trust, evidence of inequity need be only clear and convincing rather than proved beyond a reasonable doubt.[3]

Theodore Pedersen

WORKMEN'S COMPENSATION

Premium Rates.—Climate Control, Inc. v. Hill[1] was an action testing the lawfulness of premium rates fixed by the Industrial Commission for a class of policy holders referred to as self-raters.[2] The court held that policies issued by the Industrial Commission with an endorsement[3] pursuant to the self-rating statute[4] providing that, except as to loading for expense of administration and for catastrophe and excess losses, rates of premium shall be subject to the experience rating plan, does not prohibit the commission from computing the premium for basic costs in accordance with the self-rating plan. The court refused to apply a table of rates published by the commission for coverage for liability imposed by the Employers Liability Law to the policies of the self-raters, declaring that since the self-raters' policies contain no liability limits the rates are not applicable and it had no power to extend the table to encompass rates not included. The court stated that the province of the court is not to set rates but to review them.[5]

Earning Capacity.—In *Allen v. Industrial Comm'n*[6] petitioner sustained multiple scheduled injuries[7] in the course of his employment. He

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[1] See, e.g., Murillo v. Hernandez, 79 Ariz. 1, 281 P.2d 786 (1955); Stewart v. Schnepf, 62 Ariz. 440, 158 P.2d 529 (1945); Costello v. Cunningham, 16 Ariz. 447, 147 Pac. 701 (1915); Butler v. Shumaker, 4 Ariz. 16, 32 Pac. 265 (1893).

[2] 347 P.2d 568 (Ariz. 1959); see also *Courts and Civil Procedure.*

[3] 4 SCOTT, TRUSTS §§ 462.4, 462.6 (3d ed. 1960); see also RESTATEMENT, RESTITUTION. § 166 (1937).

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[1] 86 Ariz. 180, 342 P.2d 854 (1959); see also *Administrative Law* and *Evidence.*

[2] ARIZ. REV. STAT. § 23-983(E) (1956).

[3] The endorsement, in its material part, reads:

> Except as regards the loading for expense of administration and for catastrophe and excess losses, the rate or rates of premium for this policy shall be subject to the experience rating plan of the Industrial Commission of Arizona on a 100% self-rating basis, ie, the rate or rates shall be modified upward or downward in direct proportion to the ratio of actual loss experience (exclusive of catastrophe and excess losses) to the expected loss experience (exclusive of catastrophe and excess losses). Climate Control, Inc. v. Hill, 342 P.2d at 857-58.

[4] ARIZ. REV. STAT. § 23-983(E) (1956).

[5] 2 LARSON, WORKMEN'S COMPENSATION § 92.66 (1952).

[6] 347 P.2d 710 (Ariz. 1959); see also *Administrative Law.*

[7] ARIZ. REV. STAT. § 23-1044(B) (1956).

was retained by his employer at the same salary he received prior to the accident because of the employer's policy of keeping disabled employees on the job. The court held that merely because an employee is retained at the same rate of pay which he was earning prior to the accident was not sufficient grounds for refusing to grant compensation on the basis that the employee has suffered no loss of earning capacity.[8]

Vacating Awards.—Petitioner was awarded compensation for a scheduled permanent disability in *Smith v. Industrial Comm'n.*[9] He filed a petition for rehearing, claiming that a finding of the commission as to the period of time to which he was entitled total temporary disability was in error. The commission then rescinded the award and entered an award which reduced petitioner's average monthly wage prior to the injury as found in the previous award. The court affirmed the award, holding that the granting of a timely petition for rehearing vacates the award[10] and that the commission's action in ordering the former award rescinded was tantamount to granting an application for rehearing.

Idiopathic Fall.—In *Valerio v. Industrial Comm'n*[11] decedent, who had been under treatment for epilepsy, was killed when he fell and struck his head on a concrete floor while at work. In affirming the award of the Industrial Commission denying death benefits, the court held that a traumatic injury suffered by a body striking the floor is not compensable where the fall was induced by the employee's idiopathic condition.[12] The dissent felt that decedent's death arose out of his employment since the concrete floor on which he worked was an environmental factor of his employment.[13]

Wrongful Death.—Decedent was killed while riding in an automobile driven by the managing partner of his employer in *Worthington v. Industrial Comm'n.*[14] Claimant, acting as administratrix of decedent's estate, recovered under the wrongful death statute from the estate of the managing partner. The court reversed an earlier decision on the same

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[8] ARIZ. REV. STAT. § 23-1044(D) (1956). 2 LARSON, WORKMEN'S COMPENSATION §§ 57.21, 57.31, 57.32, 57.34 (1952).
[9] 347 P.2d 1010 (Ariz. 1959).
[10] Killebrew v. Industrial Comm'n, 65 Ariz. 163, 176 P.2d 925 (1947).
[11] 85 Ariz. 189, 334 P.2d 768 (1959).
[12] Sears Roebuck and Co. v. Industrial Comm'n, 69 Ariz. 320, 213 P.2d 672 (1950). 1 LARSON, WORKMEN'S COMPENSATION §§ 12.11, 12.14 (1952).
[13] Valerio v. Industrial Comm'n, 85 Ariz. 189, 192, 334 P.2d 768, 770 (1959) (dissenting opinion).
[14] 85 Ariz. 310, 338 P.2d 363 (1959).

claim,[15] holding that the recovery did not bar the claim for death benefits under the Workmen's Compensation Act.[16]

Burden of Proof.—The court in construing the Arizona Occupational Disease Disability Act[17] in *Inspiration Consol. Copper Co. v. Industrial Comm'n*[18] held that it is the claimant's burden to establish as a reasonable probability that the risk of exposure to silicosis is greater at his place of employment than the risk of exposure in the community in which he resides when his place of employment is not in close proximity to the working of quartz ore.[19]

In *Cain v. Industrial Comm'n*[20] the court held that the Industrial Commission is not under a duty to procure expert testimony merely because, in the opinion of the petitioner, it might throw further light on the case.[21] The court, citing former decisions,[22] said that the burden of proof is upon the injured party to establish his claim to the reasonable satisfaction of the commission, which means by a reasonable preponderence of the evidence.[23]

Judicial Review.—In *Helton v. Industrial Comm'n*[24] decedent was killed while driving a truck owned by his employer. Petitioners contended that due to the uncertainty of purpose for decedent's trip a presumption that he was travelling in the interests of his employer should be invoked.[25] The court said that a presumption serves to establish the presumed fact only in the absence of contrary evidence and when there is a reasonable inference that the accident did not arise out of and in the course of decedent's employment it is for the commission to weigh the credibility of conflicting evidence.[26]

The court reaffirmed its well established rule[27] that the findings of the Industrial Commission are binding upon the supreme court where

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[15] Worthington v. Industrial Comm'n, 85 Ariz. 104, 333 P.2d 277 (1958).
[16] 1 SCHNEIDER, WORKMEN'S COMPENSATION § 98 (3d ed. 1941).
[17] ARIZ. REV. STAT. tit. 23 c. 7 (1956).
[18] 85 Ariz. 204, 335 P.2d 416 (1959).
[19] ARIZ. REV. STAT. § 23-1103(4) (1956).
[20] 347 P.2d 699 (Ariz. 1959); see also *Administrative Law.*
[21] Egleston v. Industrial Comm'n, 52 Ariz. 276, 80 P.2d 689 (1938).
[22] Schweiterman v. Industrial Comm'n, 76 Ariz. 58, 258 P.2d 818 (1953); Bochat v. Prescott Lumber Co., 51 Ariz. 97, 74 P.2d 575 (1937).
[23] Cole v. Town of Miami, 52 Ariz. 488, 83 P.2d 997 (1938).
[24] 85 Ariz. 276, 336 P.2d 852 (1959); see also *Evidence.*
[25] Martin v. Industrial Comm'n, 73 Ariz. 401, 242 P.2d 286 (1952).
[26] See Valerio v. Industrial Comm'n, *supra* note 13; 2 LARSON, WORKMEN'S COMPENSATION § 80.20 (1952).
[27] Lopez v. Am. Smelting & Refining Co., 84 Ariz. 7, 322 P.2d 890 (1958); Hall v. Industrial Comm'n, 83 Ariz. 1, 315 P.2d 659 (1957); Hewett v. Industrial Comm'n, 72 Ariz. 203, 232 P.2d 850 (1951); 2 LARSON, WORKMEN'S COMPENSATION § 80.20.

medical evidence is in conflict in *Henninger v. Porter*[28] and *Domiani v. Industrial Comm'n.*[29]

However, the findings of the Industrial Commission must be supported by competent evidence and this requirement cannot be glossed over by mere enumeration by the commission of highly conclusory findings[30] the court stated in *Allen v. Industrial Comm'n.*[31]

Partial Disability.—Weiss v. Industrial Comm'n[32] involved interpretation of the statute which provides for compensation for partial loss of use of an arm.[33] Petitioner contended that the term "partial loss of use" in the statute refers to a partial loss of capability to do the job. The court, in rejecting petitioner's contention, affirmed the award of the Industrial Commission construing the statute as referring to a percentage of physical functional disability.

Edward Leigh Larson

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[28] 85 Ariz. 184, 334 P.2d 765 (1959).
[29] 344 P.2d 1020 (Ariz. 1959).
[30] Wammack v. Industrial Comm'n, 83 Ariz. 321, 321 P.2d 950 (1958); 2 LARSON, WORKMEN'S COMPENSATION § 80.10.
[31] *Supra* note 6.
[32] 347 P.2d 578 (Ariz. 1959); see also *Administrative Law.*
[33] ARIZ. REV. STAT. § 23-1044(B) (21) (1956).

Notes

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — TRIAL OF DEFENDANT FOR HIGHER OFFENSE AFTER SUSPENSION OF TRIAL FOR LESSER ONE MAY CONSTITUTE DOUBLE JEOPARDY.—In a second degree murder trial, after the state had presented its case, the trial judge granted a motion by the county attorney to dismiss the case on the statutory ground[1] that an offense of a higher order had been established by the proof. After the defendant's subsequent trial and conviction for first degree murder his application for a writ of habeas corpus was denied by the superior court. On appeal, *held,* reversed. Where the elements needed to sustain a second degree murder charge are implicit in the evidence necessary to uphold a conviction of first degree murder, the defendant, who has once been placed in jeopardy by the swearing of the jury on the second degree charge cannot constitutionally be placed in jeopardy again by suspension of proceedings and be tried for first degree murder. *Application of Williams,* 85 Ariz. 109, 333 P.2d 280 (1958).

Although the Fourteenth Amendment does not prohibit multiple state criminal trials for the same offense,[2] there is some suggestion if a state were ". . . to wear the accused out by a multitude of cases with accumulated trials . . ."[3] it might be of such hardship and so shocking as to violate the federal constitution. At least forty-one states have provisions prohibiting double jeopardy, either in their constitution[4] or by statute.[5] These provisions are merely declaratory of the common law rule.[6]

In interpreting double jeopardy enactments, the question of at what stage of the proceedings jeopardy attaches, poses a problem for the

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[1] ARIZ. REV. STAT. § 13-1595 (1956).

"A. If upon the trial of any action it appears to the court by the testimony that the facts proved constitute an offense of a higher nature than that charged, the court may direct that the jury be discharged and all proceedings on the indictment or information suspended, and may order the commitment of the defendant, . . . to answer any indictment which may be returned or any information which may be filed against him . . . .

"B. If the defendant is . . . [held] for a higher offense, as provided in subsection A, it is not an acquittal of the offense in which proceedings were suspended, and no plea of former jeopardy or former acquittal shall be sustained by reason thereof."

[2] Amrine v. Tines, 131 F.2d 827 (10th Cir. 1942); *Ex parte* Dixon, 330 Mo. 652, 52 S.W.2d 181 (1932).

[3] Palko v. Connecticut, 302 U.S. 319, 328 (1937).

[4] Kneier, *Prosecution Under State Law and Municipal Ordinance As Double Jeopardy,* 16 CORNELL L.Q. 202 n. 4 (1931). For the Ariz. clause, see ARIZ. CONST. art. 2, § 10.

[5] State v. Williams, 21 N.J. Misc. 329, 34 A.2d 141 (Recorder's Ct. N.J. 1943).

[6] Harris v. State, 17 Okla. Crim. 69, 175 Pac. 627 (1918).

courts. A variety of answers has been given. For example, it has been held that where a demurrer to an indictment has been sustained, the defendant has been once in jeopardy and may not be put upon trial again for the same offense.[7] In other jurisdictions jeopardy does not attach until the case has been tried upon a valid indictment and finally disposed of by the appellate court, after full opportunity for a hearing on appeal, on behalf of both defendant and the state.[8] Between these two extremes a number of other points in the proceedings have been selected. Some courts have held that jeopardy does not attach until a valid verdict, either of acquittal or conviction, has been rendered.[9] The majority of states hold that jeopardy attaches when the jury is sworn in a court of competent jurisdiction.[10] This is also the prevailing view in the federal courts.[11]

Where jeopardy attaches once the jury is sworn in, if the jury is discharged without the defendant's consent, express or implied, the accused may plead former jeopardy, unless there was a manifest necessity for such discharge.[12] At common law once the defendant was indicted for a crime jeopardy attached and could not be removed for any reason.[13] Today improper discharge amounts to an acquittal and may be placed in bar to further trial or subsequent indictment.[14] Absolute necessity, which makes discharge proper, exists when the presiding judge becomes ill,[15] there is no reasonable expectation that the jury will be able to agree,[16] a juror becomes incapacitated from performing his duty,[17] and illness is suffered by the defendant.[18] Legal necessity does not exist where the court discharges the jury because it is of the opinion that the evidence shows him guilty of a higher crime, for which crime he is subsequently indicted. The defendant is therefore twice in jeopardy and cannot be indicted for the same offense.[19]

The problem of what constitutes the same offense has been a perplexing riddle to the courts. The test most often used, is, if the facts charged in the second indictment, if found to be true would justify

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[7] State v. Fields, 106 Iowa 406, 76 N.W. 802 (1898).
[8] State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894).
[9] Anderson v. State, 86 Md. 497, 38 Atl. 937 (1897).
[10] Westover v. State, 66 Ariz. 145, 185 P.2d 315 (1947).
[11] Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949).
[12] State *ex rel.* Dato v. Himes, 134 Fla. 675, 184 So. 244 (1938).
[13] *Ex Parte* Lange, 85 U.S. (18 Wall.) 163 (1874).
[14] State *ex rel.* Dato v. Himes, *supra* note 12.
[15] Westover v. State, *supra* note 10.
[16] Morgan v. State, 28 Ariz. 363, 236 Pac. 1112 (1925).
[17] State v. Miller, 331 Mo. 675, 56 S.W.2d 92 (1932).
[18] People *ex rel.* Jimmerson v. Freiberg, 137 Misc. Rep. 314, 243 N.Y. Supp. 590 (Sup. Ct. 1930).
[19] Ingram v. State, 124 Ga. 448, 52 S.E. 759 (1905).

a conviction of the prior charge, then the offenses are the same.[20] Thus, in the instant case, the defendant could not be tried for first degree murder, after having been placed in jeopardy for second degree murder as both offenses are identical, the only difference being one of degree, both consist of the unlawful killing of a human being with malice aforethought.[21]

The Arizona court in rendering its decision in the *Williams* case has left the law as to double jeopardy in an uncertain status. The court reasoned that jeopardy attaches when the jury is impaneled, that the discharging of a jury to try the defendant for the higher offense is not such a legal necessity as to prevent a plea of former jeopardy, and that, therefore, to try the defendant again under these circumstances, would amount to double jeopardy. If the court in arriving at its decision had considered subsection B of the statute[22] it might have reached a different conclusion. The subsection of the statute says that when the jury is discharged so the defendant can be tried for the higher offense, the accused has not been in jeopardy. In order for the accused not to have been in jeopardy the court would have to change its decision as to when jeopardy attaches. By deciding for instance that jeopardy does not attach until a valid verdict has been rendered, the defendant would not have been in jeopardy and could be tried again for the same offense. It would seem that, if the statute is brought before the court again, it will either have to strike down the statute or reverse its decision as to when jeopardy attaches.

Alfred J. Rogers

CONSTITUTIONAL LAW — SUBSTANTIVE DUE PROCESS — PROHIBITION OF SALE OF IMITATION ICE MILK. — The defendants manufactured and sold a product known as "Imitation Ice Milk." Although it was a nutritious, healthful, and clearly labeled food, it contained vegetable fat, and an Arizona Statute prohibited the manufacture or sale of any "dairy product" which contained any non-milk fat.[1] The trial court certified the case to the supreme court. On certification, *held*, statute unconstitutional. Outlawing nutritious and healthful "dairy products" which contain fats other than milk fats transcends the police power of the

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[20] Warren v. State, 79 Neb. 526, 113 N.W. 143 (1907).
[21] Singh v. State, 35 Ariz. 432, 280 Pac. 672 (1929).
[22] ARIZ. REV. STAT. § 13-1595(B) (1956).

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[1] ARIZ. REV. STAT. §§ 3-630, -632 (1956). The adding of vegetable fat to "dairy products" constitutes "filled milk."

state, and thus violates due process and equal protection of the law.[2] *State v. A. J. Bayless Markets Inc.*, 86 Ariz. 193, 342 P.2d 1088 (1959).

Legislation enacted by states for the protection of the safety, health, morals, and general welfare of citizens must bear some reasonable relation to the objectives sought to be achieved.[3] There is a split of authority whether statutes outlawing "filled milk" do so.[4] Some jurisdictions have determined that if the enactment denies vendors the right to offer proof with respect to adulteration and fraud, it deprives them of due process of law and of equal protection of the law.[5] Other states express the view that such a statute is valid even though some "innocent" products are embraced within its prohibition.[6] The word "innocent" is construed to mean those "dairy products" containing fats other than milk fats which are nutritious and healthful. The federal courts have upheld a federal law[7] which declares "filled milk" an adulterated food, outlaws its manufacture within any territory or possession or the District of Columbia, and prohibits the shipment of it in interstate commerce.[8] In the leading case of *United States v. Carolene Products*,[9] the Supreme Court sustained this statute as a valid exercise of Congressional power under the commerce clause of the United States Constitution.

According to the Arizona Supreme Court, legislative prohibition of the sale of imitation ice milk represented an over-extension of the police powers because it bore no reasonable relation to the protection of the health, safety, morals, or general welfare of the people.[10] The Arizona statute not only declared conclusively that the defendants' product was adulterated and worked a fraud upon the public, but also contained no provision whereby the defendants were able to prove their product was wholesome and healthful and properly labeled. The

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[2] The Arizona due process clause is ARIZ. CONST. art 2, § 4. The Arizona equal protection clause is ARIZ. CONST. art 2, § 13.

[3] See Edwards v. State Board of Barber Examiners, 72 Ariz. 108, 231 P.2d 450 (1951); Carolene Products Co. v. Banning, 131 Neb. 429, 268 N.W. 313 (1936); 15 CHI.-KENT L. REV. 211 (1937).

[4] Carolene Products Co. v. Banning, *supra* note 3; 15 NEB. L. REV. 192 (1936).

[5] Carolene Products Co. v. McLaughlin, 365 Ill. 62, 5 N.E.2d 447 (1936); People v. Carolene Products Co., 345 Ill. 166, 177 N.E. 698 (1931); Carolene Products Co. v. Thomson, 276 Mich. 172, 267 N.W. 608 (1936); Carolene Products Co. v. Banning, *supra* note 3; *accord*, Rigbers v. Atlanta, 7 Ga. App. 411, 66 S.E. 991 (1910); Dairy Queen of Wisconsin v. McDowell, 260 Wis. 471, 51 N.W.2d 34 (1952).

[6] Hebe Co. v. Shaw, 248 U.S. 297 (1919); State *ex. rel.* Mitchell v. Sage Stores Co., 157 Kan. 404, 141 P.2d 655 (1943); Carolene Products Co. v. Harter, 329 Pa. 49, 197 At. 627 (1938); State v. Emery, 178 Wis. 147, 189 N.W. 564 (1922).

[7] 42 Stat. 1486-1487 (1923), 21 U.S.C. §§ 61-63 (1952).

[8] Carolene Products Co. v. Wallace, 27 F. Supp. 110 (D.C. Cir. 1939); Carolene Products Co. v. Evaporated Milk Ass'n., 93 F.2d 202 (7th Cir. 1938); 17 N.Y.U.L.Q. REV. 118 (1939).

[9] United States v. Carolene Products Co., 304 U.S. 144 (1938).

[10] State v. A.J. Bayless Markets Inc., 86 Ariz. 193, 342 P.2d 1088 (1959).

presence of such a declaration, and the omission of such a provision in the statute involved, invaded the province of the judiciary, because the court was precluded from determining whether the legislative means employed bore any real and substantial relationship to the public health, safety, morals or general welfare.[11] Since the law did not allow the defendants to prove that their product was not adulterated and thereby protect their property rights, it discriminated against their product solely on the basis of its combination of wholesome ingredients, and thus contravened due process and equal protection of the law.[12]

This case indicates that the statute, which was declared unconstitutional, represents nothing more than an over-zealous attempt on the part of the legislature to protect the dairy industry from competition. The decision expressly prohibits legislative mis-branding of innocent products, but it does not prevent the legislature from proscribing the dissemination of harmful or fraudulently labeled food products.

Grant Arthur Bird

COURTS—SERVICE OF PROCESS—SERVICE ON ATTORNEY OF RECORD INVALID WHEN PLAINTIFF INFORMED ATTORNEY NO LONGER REPRESENTS CLIENT.—Notice to take the defendant's deposition, and the notice of plaintiff's motion to strike the defendant's answer and for default judgment upon his failure to appear, were both served on defendant's attorney of record, who each time informed plaintiff's attorneys that he no longer represented the defendant. A default judgment was entered for the plaintiff. An attorney, who was substituted as attorney for defendant, filed a motion, which was denied, to set aside the default judgment, based on defendant's affidavit that he had no personal notice that the deposition was to be taken. On appeal, *held*, reversed. Attempted service of notice of the taking of a deposition upon an attorney of record, by one who has knowledge that such attorney no longer represents the client, is not such valid notice as will support a default judgment. *Schatt v. O.S. Stapley Co.*, 84 Ariz. 58, 323 P.2d 953 (1958).

The principle was firmly established in 1884 by *United States v. Curry* that:

> No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court. And while his

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[11] People v. Belcastro, 356 Ill. 144, 190 N.E. 301 (1934); Banghart v. Walsh, 339 Ill. 132, 171 N.E. 154 (1930); People *ex rel.* Barmore v. Robertson, 302 Ill. 442, 134 N.E. 815 (1922).

[12] Weaver v. Palmer Bros., Co., 270 U.S. 402 (1926); see People v. Price, 257 Ill. 587, 101 N.E. 196 (1913); *accord*, Gillespie v. People, 188 Ill. 176, 58 N.E. 1007 (1900); see John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N.W. 369 (1927); 12 MINN. L. REV. 75 (1927).

> name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself.[1]

This is true even though the relationship of attorney and client may be terminated as between the attorney and client.[2] The duty to secure the court's permission arises from the fact that the relation sustained by an attorney imposes upon him a dual obligation, the one to his client and the other to the court.[3] The attorney's right to withdraw his employment, once assumed, exists only for good cause, and the desire or consent of the client may not even be sufficient.[4] These views, which are recognized in Arizona under Rule 80(E),[5] make it clear that the attorney of record, in the instant case, violated his duty. He neither asked that he be allowed to withdraw when his relationship with the defendant ended, nor did he seek permission to withdraw after the plaintiff served notice upon him. Furthermore, he failed to inform his former client that he was to appear.

Conceding the fact that the attorney of record should have secured the permission of the court and formally withdrawn, what can be said concerning the actions of the plaintiff's attorneys? The general law applicable to the situation is stated in the Arizona case of *Biaett v. Phoenix Title & Trust Co.*[6] There the court said that under the Federal Rules,[7] which Arizona has adopted, it is mandatory that service of pleading be made on a party's attorney, if he has one, and only by permission of the court can it be served on the party himself who has appeared and is represented by an attorney.[8] Thus it is apparent that the plaintiff fulfilled

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[1] 47 U.S. (6 How.) 106, 111 (1848). See also Rio Grande Irrigation Co. v. Gildersleave, 174 U.S. 603 (1899); Davis v. Wakelee, 156 U.S. 680 (1895); Tripp v. Santa Rosa Street R.R., 144 U.S. 126 (1892); Lovvorn v. Johnston, 118 F.2d 704 (9th Cir. 1941).

This doctrine has been extended so that the relation as attorney of record does not terminate upon the rendition of judgment, but continues as long as the opposing party has the right to challenge the validity of the judgment. Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950); PERSIG, THE LEGAL PROFESSION 205 (1957).

[2] Wainwright v. McDonaugh, 290 Ill. App. 50, 7 N.E.2d 915 (1937); see also PERSIG, THE LEGAL PROFESSION 201 (1957).

[3] Roediger v. Sapos, 217 N.C. 95, 6 S.E.2d 80 (1940).

[4] Canons Of Professional Ethics No. 44.

[5] ARIZ. R. CIV. P. 80(E) "When the appearance of counsel has been entered for a party in any action or proceeding, he will be held responsible by the court for the conduct of the action until formal notice of withdrawal approved by the court and entered upon the minutes."

[6] 70 Ariz. 164, 217 P.2d 923 (1950).

[7] FED. R. CIV. P. 5(B) "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court."

[8] Collins v. Wayland, 139 F.2d 677 (9th Cir. 1944); Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir. 1944); Loosley v. Stone, 15 F.R.D. 373 (S.D. Ill. 1954); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 203 (1950); 2 MOORE, FEDERAL PRACTICE § 5.06 (2d ed. 1948); Illsen, *Recent Cases and New Developments in Federal Practice and Procedure,* 16 ST. JOHNS L. REV. 1 (1941).

all the technical requirements of the Federal Rules.[9] However, should there be any question as to the attorney's continued authority to represent the client, it is desirable to obtain an order authorizing service on the party himself.[10] Under the facts presented, this would certainly have been the preferable course for plaintiff to follow; but admittedly the rule only permits and does not specifically require such action.

It has been contended that withdrawal of an attorney of record without the court's permission might impede the administration of justice,[11] cause unnecessary difficulty and expense, make it impossible to serve a party outside the jurisdiction or one who's address is unknown,[12] and create confusion by allowing a party to change his attorney at will so that the court would be uncertain as to when the cause was legitimately before it.[13] Had the decision in the instant case been for the plaintiff, these difficulties could not develop. Furthermore, the defendant might well have had a cause of action against his attorney of record for damages resulting from improper withdrawal.[14] This would place the responsibility upon the one who had the duty to act, as well as avoiding the problems which the actual decision might promote.

Nevertheless, the conclusion reached by the court is sound. One main object of the general rule, that a party is entitled to deal with an attorney of record for opposing parties, is to protect the plaintiff when the relationship between the defendant and his attorney has been terminated without the plaintiff's knowledge.[15] Therefore, the doctrine should not be applied when the plaintiff is informed that the record no longer represents the true situation and he is not prejudiced by such fact.[16] The party entitled to protection under these circumstances is the defendant. Even though the defendant's attorney was required to secure the permission of the court and formally withdraw, the client should not be penalized for his attorney's failure,[17] particularly when the plaintiff was not misled and had another remedy available. In addition, it might

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[9] Matter of Hewitt Grocery Co., 33 F. Supp. 493 (D. Conn. 1940); Ohio Casualty Ins. Co. v. Murphy, 28 F. Supp. 252 (W.D. Ky. 1939).

[10] Tilghman v. Tilghman, 57 F. Supp. 417 (D.D.C. 1944); 2 MOORE, *op cit. supra* note 8, § 5.06. There is also authority for the proposition that under certain circumstances, without advance authority from the court, personal service on a party, rather than his attorney, will be approved. 1 BARRON & HOLTZOFF, *op. cit. supra* note 8, § 203.

[11] United States v. Curry, *supra* note 1.

[12] *Ibid.*

[13] United States v. McMurtry, 24 F.2d 145 (S.D.N.Y. 1927).

[14] Howard v. McCarson, 215 Ala. 251, 110 So. 296 (1926).

[15] See Anderson v. City R.R., 9 Cal. App. 2d 205, 48 P.2d 969 (1935).

[16] Schatt v. C. S. Stapley Co., 84 Ariz. 58, 323 P.2d 953 (1958); see also Hendricks v. Town of Cherryville, 198 N.C. 659, 153 S.E. 112 (1930); Nuessler v. Bergman, 141 Wash. 297, 251 Pac. 578 (1926); Beliveau v. Amoskeage Mfg., 68 N.H. 225, 40 Atl. 734 (1895).

[17] Schatt vs. C.S. Stapley Co. *supra* note 16; *cf.* Dooley v. Slavit, 53 R.I. 264, 165 Atl. 771 (1933).

be assumed that the court was influenced by the doctrine that default judgments are not favored by the law.[18]

This decision does not depart from the Federal Rules, nor does it leave the proper procedure for service of pleadings in an uncertain state. The plaintiff should first serve the attorney of record. If, however, the situation in the instant case is encountered, he should apply for permission to serve the defendant personally, and thereby fully perform his obligation. The client's right to discharge his attorney is not so absolute that it can be exercised when it will unduly prejudice the other party or interfere with the administration of justice.[19] Therefore, the court should not release the attorney of record where there is evidence that, solely to hinder and avoid the action, the defendant has discharged his attorney, and left the jurisdiction or otherwise made his whereabouts difficult to ascertain. The court has been cognizant of the principle that the Federal Rules should be construed to secure a just determination in every action,[20] and this same doctrine should be applied when the conduct of either the defendant or his attorney operate unjustly as to the plaintiff.

Richard T. Coolidge

EVIDENCE — RELEVANCE AND MATERIALITY — SIMILAR FACT EVIDENCE TO SHOW PLAN OR SCHEME. — The defendant was convicted of forcible rape. Over his objection the testimony of a seventeen year old girl that five days prior to the offense charged the defendant had raped her was admitted into evidence. The witness's testimony and that of the prosecutrix were similar in that: (1) the alleged rape occurred at night in a parked auto; (2) the defendant bluntly announced his intention to have intercourse and upon being refused forcibly accomplished his purpose; and (3) during the perpetration of the act he underwent a Jekyll-Hyde character change. The trial judge instructed that such evidence was admissible for the sole purpose of showing a system, plan or scheme of the defendant. On appeal, *held*, affirmed. Evidence of prior crimes is admissible for the purpose of showing a system, plan or scheme embracing two or more crimes so related that the proof of one tends to establish the other. *State v. Finley*, 85 Ariz. 327, 338 P.2d 790 (1959).

Generally, in a prosecution for a crime, evidence which shows or tends to show that the accused has committed another crime wholly independent of the one with which he is charged, even though it is

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[18] Marsh v. Riskas, 73 Ariz. 7, 236 P.2d 746 (1951).
[19] People v. Franklin, 415 Ill. 514, 114 N.E.2d 661 (1953).
[20] Tilghman v. Tilghman, *supra* note 10. The rules themselves provide: "They shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

a crime of the same sort, is irrelevant and inadmissible.[1] It is a well-recognized exception to this rule that where evidence of prior crimes tends to establish a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other, such evidence becomes both relevant and admissible.[2] According to Dean Wigmore, evidence of a prior crime to show a design or plan is admissible only where the actual doing of the act charged must be proved.[3] The evidence must be used to establish a definite design or system which included as an element of its consummation the commission of the act charged. The combination of common features that will suggest such a common plan involves a much higher degree of similarity than that required to show, for example, intent.[4]

It is difficult, however, to reconcile the decisions of the various jurisdictions.[5] On the one hand, some courts have adopted a rather liberal view of the question, requiring no more than similarity in character and reasonable proximity in time,[6] while other courts have scrutinized the relevancy of such testimony with great care and admitted it only when the facts were very compelling.[7] The previous Arizona rule was one of comparative conservatism and was applied only after careful consideration and in cases where such application was substantially supported by the facts.[8]

The application of the plan or scheme doctrine in the instant case alters the theory in this jurisdiction to one of great liberalism. As was pointed out by Judge Struckmeyer in his dissent,[9] the facts of the two cases simply do not support the theory that the defendant was acting in pursuance of a plan or scheme. The element of force is a necessary ingredient under any circumstances in a case of forcible rape, and mere similarity as to the type of force used is of little, if any, probative

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[1] Neff v. United States, 105 F.2d 688 (8th Cir. 1939); State v. Thomas, 71 Ariz. 423, 229 P.2d 264 (1951); Crowell v. State, 15 Ariz. 66, 136 Pac. 279 (1913); 1 WIGMORE, EVIDENCE § 192 (3d ed. 1940).

[2] State v. Martinez, 67 Ariz. 389, 198 P.2d 115 (1948); Taylor v. State, 55 Ariz. 13, 97 P.2d 543 (1940); People v. Cosby, 137 Cal. App. 332, 31 P.2d 218 (1934); 2 WIGMORE, EVIDENCE § 304 (3d ed. 1940).

[3] 2 WIGMORE, EVIDENCE § 304 (3d ed. 1940).

[4] *Id.* at 204.

[5] For a complete and exhaustive study, see Stone, *The Rule of Exclusion of Similar Fact Evidence; America*, 51 HARV. L. REV. 988 (1938).

[6] See, *e.g.*, Keese v. State, 223 Ark. 261, 265 S.W.2d 542 (1954); State v. Collins, 126 Kan. 17, 266 Pac. 937 (1928); Helton v. Commonwealth, 312 Ky. 268, 244 S.W.2d 762 (1951).

[7] See, *e.g.*, Lovely v. United States, 169 F.2d 386 (4th Cir. 1948); People v. Cosby, *supra* note 2; Nester v. State, 334 P.2d 524 (Nev. 1959); Commonwealth v. Kline, 361 Pa. 434, 65 A.2d 348 (1948).

[8] State v. McDaniel, 80 Ariz. 381, 298 P.2d 798 (1956); Taylor v. State, *supra* note 2.

[9] State v. Finley, 85 Ariz. 327, 336, 338 P.2d 790, 797 (1959) (dissenting opinion).

value.[10] The fact that both crimes took place in parked automobiles at night is a feature so common to such occurrences that, even taken in connection with the other facts, it lends nothing to the proof of a plan or scheme. As for the defendant's blunt announcement of his intentions, Judge Struckmeyer pointed out that rarely is such a crime committed that sometime during its prosecution such an announcement is not made.[11] Also, the Jekyll-Hyde character change of the defendant, testified to by both victims and upon which the court laid particular emphasis, may be of some probative value in showing identity or sexual aberration, each of which is an entirely separate matter for proof,[12] but contribute nothing toward showing that the acts flowed from a preconceived plan. Finally, the doing of the act charged was not in doubt here. Both parties freely admitted that acts of sexual intercourse took place. The fact that the accused allegedly used force in perpetrating a statutory rape on the one hand does not necessarily suggest that another, mature, woman did not consent in spite of certain similarities between the two incidents.

In admitting evidence of prior crimes under such circumstances, the court allows an attack to be made on the character of the accused without such character being in issue. The effect on the jury is immediate, extremely prejudicial, and persists notwithstanding cautionary instructions by the trial judge. It is true that under certain special circumstances such evidence is of great importance in proving the guilt of the accused,[13] and that in these cases the doctrine of inadmissibility of prior crimes must give way in the interests of justice; but where special circumstances do not exist, as here, it would seem that exclusion is the better alternative.

Kenneth G. Flickinger, Jr.

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[10] *Id.* at 338, 338 P.2d at 798; State v. Sauter, 125 Mont. 109, 232 P.2d 731 (1951); 2 WIGMORE, EVIDENCE § 304 (3d ed. 1940).

[11] State v. Finley, *supra* note 9 at 338, 338 P.2d at 798 (1959).

[12] In deciding that the plan or scheme exception applied in the instant case the court relied on the marked similarity between the two incidents, and stated that the rationale underlying the admissibility of evidence of prior acts of rape is partially for the purpose of showing the defendant's criminal desires and lustful propensities to commit such a crime. State v. Finley, *supra* note 9 at 334, 338 P.2d at 795 (1959). The latter is an entirely separate matter having no bearing on the plan or scheme doctrine, and much care must be taken not to confuse the two principles in deciding whether one or the other applies. Bracey v. United States, 142 F.2d 85 (D.C. Cir. 1944); State v. McDaniel, *supra* note 8; Hash v. State, 48 Ariz. 43, 59 P.2d 305 (1936).

[13] *E.g.*, State v. Martinez, *supra* note 2 (to show plan or scheme); State v. Singleton, 66 Ariz. 49, 182 P.2d 920 (1947) (to show knowledge); James v. State, 53 Ariz. 42, 84 P.2d 1081 (1938) (to show identity); Douglass v. State, 44 Ariz. 84, 33 P.2d 985 (1934) (to show intent); Lewis v. State, 32 Ariz. 182, 256 Pac. 1048 (1927) (to show motive).

FEDERAL CIVIL PROCEDURE—SERVICE OF PROCESS—PASSENGER IN INTERSTATE COMMERCIAL AIR FLIGHT WITHIN "TERRITORIAL LIMITS" OF STATE OVER WHICH HE IS FLYING.—A defendant in a contract action in the Federal District Court for the Eastern District of Arkansas was served with process while he was flying over Arkansas in an interstate commercial air flight which did not land in that state. He moved to quash the summons on the ground that he was not within the "territorial limits" of the state within the meaning of Rule 4(f) of the Federal Rules of Civil Procedure.[1] *Held,* motion dismissed. For service purposes, the passengers on a commercial aircraft are within the territorial limits of the state over which the plane is flying at the time. *Grace v. MacArthur,* 170 F. Supp. 442 (E.D. Ark. 1959).

To conclude that flight over a state constitutes presence within the state—at least for service purposes—it must be found that the state has sovereignty over its super-adjacent airspace. Basically, there are two grounds for such a finding: the states themselves assert such sovereignty; and the federal government acquiesces in it.

Numerous states, including Arizona, make direct statutory proclamation that "sovereignty in the space above . . . this state is declared to rest in the state."[2] Other legislative provisions are less direct, but necessarily proceed upon the assumption of sovereignty: that the laws of the state will govern crimes, torts, and other wrongs,[3] as well as contractual and other legal relations entered into by persons while in flight over the state;[4] and that the *usque ad coelum doctrine*[5] obtains in the jurisdiction.[6]

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[1] FED. R. CIV. P. 4(f). "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when a statute of the United States so provides, beyond the territorial limits of that state."

[2] ARIZ. REV. STAT. § 2-111 (1956). See, e.g., UNIFORM AERONAUTICS ACT § 2.

[3] ARIZ. REV. STAT. § 2-113 (1956). See, e.g., UNIFORM AERONAUTICS ACT § 7.

[4] ARIZ. REV. STAT. § 2-114 (1956). See, e.g., UNIFORM AERONAUTICS ACT § 8.

[5] The doctrine is more fully stated, *Cujus est solum est usque ad coelum;* it is generally translated, "The owner of the soil owns to the heavens." BLACK, LAW DICTIONARY (4th ed. 1951).

"Almost the first, if not the very first, case in a court of last resort to deal with the relative rights of the aviator and the landowner was the case of Smith v. New England Aircraft Co., Inc., 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300, decided by this court in 1930." Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575, 577 (1942).

Many are the variations and qualifications of the doctrine. For the Arizona view, see Brandes v. Mitterling, 67 Ariz. 349, 196 P.2d 464 (1948), to the effect that an owner's action for invasion of his airspace is not in trespass, but in nuisance. The court cites the *usque ad coelum* doctrine in particular at 354, 196 P.2d at 467.

See also Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936) announcing the "actual use" doctrine; 1 RESTATEMENT, TORTS § 159 (1934).

[6] ARIZ. REV. STAT. § 2-112 (1956). See, e.g., UNIFORM AERONAUTICS ACT § 3. The Committee on Aeronautical Law of the American Bar Association rejected this section of the UNIFORM AERONAUTICS ACT. In regard to its proposed UNIFORM AERONAUTICS CODE, the committee stated a unanimous belief "that the statement as to ownership of airspace proclaims a legal untruth." 56 A.B.A. REP. 318 (1931).

See also 1 RESTATEMENT, TORTS § 194 (1934).

With reference to the problem in the instant case, and the interpretation given this section by the United States Supreme Court, see note 23, *infra.*

State assertion of sovereignty can be found by deed as well as word. Massachusetts sought to regulate minimum altitudes of airflight, and its power to do so was upheld in the leading case of *Smith v. New England Aircraft Co.*[7] The court rested that power on possession of "jurisdiction to control the airspace,"[8] bottomed on the "necessity of self-protection,"[9] and "essential to the safety of the sovereign states."[10] Such sovereignty, said the court, "was vested in this Commonwealth when it became a sovereign state on its separation from Great Britain."[11] Similarly, Minnesota's establishment of an airports commission was upheld;[12] its court stated that

> . . . [S]ubject only to the constitutional powers of congress over interstate traffic . . . the state has not only the jurisdiction to control air traffic above the territory within its boundary, but the responsibility of a sovereign to protect such traffic . . . .[13]

That the federal government acquiesces in state assertion of airspace sovereignty is illustrated by *Braniff Airways, Inc. v. Nebraska Bd. of Equalization and Assessment.*[14] In that case, the United States Supreme Court found that federal air acts proclaiming "exclusive national sovereignty"[15] over the airways are meant to exclude foreign powers, but are *not* expressly directed at the states.[16] Thus, Nebraska was held not precluded by the federal air acts from exacting its own tax on interstate airliners whose only contact with the state was by flights over it, and

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[7] 270 Mass. 511, 170 N.E. 385 (1930). See note 5, *supra.*

[8] *Id.*, 170 N.E. at 389.

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.*

[12] Erickson v. King, 218 Minn. 98, 15 N.W.2d 201 (1944).

[13] *Id.*, 15 N.W.2d at 204. To the same effect, see State *ex rel.* Board of Aeronautics v. Sims, 129 W. Va. 694, 41 S.E.2d 506 (1947). In upholding the state's delegation of power to a municipality or county to operate an airport, the court stated: ". . . [T]he control of aviation is the prerogative of the state, under the police power, and . . . the Legislature may enact laws providing for its regulation and appropriate public funds therefor." *Id.*, 41 S.E.2d at 509.

[14] 347 U.S. 590 (1954).

[15] Air Commerce Act of 1926, § 6, 44 Stat. 568, 572; Civil Aeronautics Act of 1938, § 1107, 52 Stat. 973, 977, 1028 (now Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C.A. §§ 1301 *et seq.* (Supp. 1958).

[16] Braniff Airways, Inc., v. Nebraska Bd. of Equalization and Assessment, *supra* note 14, at 595. The Court, in determining the legislative intent behind these acts, cited the House committee report relative to their passage, which states: "The declarations of the sovereignty of the United States *as against foreign nations* in the air space above the United States is based upon a similar declaration found in the International Air Navigation convention." H.R. Rep. No. 572, 69th Cong., 1st Sess. 10 (1926). (Emphasis added.) The placement of this section of the act under the heading "Foreign Aircraft . . ." seems to indicate clearly that "exclusive national sovereignty" means exclusive of foreign powers, not the states. In the *Braniff* case, *supra*, at 596, Reed, J., said: "Recognizing this 'exclusive national sovereignty' and right of freedom in air transit, this court in United States v. Causby, 328 U.S. 256, 261, nevertheless held that the owner of land might recover for a taking by national use of navigable air space, resulting in destruction in whole or in part of the usefulness of the land property.'

brief stops in it for baggage and passengers.[17] Federal regulation of the airways, said the Court, is based on the commerce power, not on national ownership of the airspace.[18] This notion is analogous to the long recognized doctrine that, while the government has power to regulate commerce on navigable streams, the title to the bed and banks remains in the states and the riparian owners.[19] Further, the Court in the Braniff case determined that the federal government itself has declared the "public right of freedom of transit" for air commerce;[20] and that, notwithstanding the federal legislative activity in 1926,[21] a score of states subsequently adopted provisions of the Uniform Aeronautics Act[22] which assert state airspace sovereignty.[23]

The soundness of the decision in the instant case is further established by its express confinement to "ordinary commercial aircraft, flying on an ordinary commercial flight in the ordinary navigable and navigated airspace of 1958."[24] The decision does not purport to bind future jurists in their considerations of such knotty problems as whether or not state sovereignty would embrace ultra-high-speed craft traveling in what is today's space frontier—and beyond. Thus concerned with only present-day commercial airflight, the court observed that aviation is really quite like ground travel,[25] the principal difference being a matter of speed, with the result that interstate aircraft spend less time "within" a given jurisdiction than do ground vehicles.[26] This, the court concluded, need not preclude the application of existing law to air travel.[27]

An earlier and similar conclusion was reached in a case which held that flight over a jurisdiction constituted "entry" into that jurisdiction for

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[17] *Id.* at 597.

[18] *Id.* at 596

[19] *Id.* at 597, citing FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 246 (1954); United States v. Kansas City Ins. Co., 339 U.S. 799, 808 (1950); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 60 (1913).

[20] *Id.* at 595, citing the Civil Aeronautics Act of 1938, *supra* note 15.

[21] Air Commerce Act of 1926, *supra* note 15, at 572.

[22] 11 UNIFORM LAWS ANNOTATED 157 *et seq.* The court noted that the "recommendation of the National Conference of Commissioners on Uniform State Laws to the states to enact this Act was withdrawn in 1943," but concluded nevertheless that "where adopted, . . . it continues in effect." Braniff Airways, Inc., v. Nebraska Bd. of Equalization and Assessment, *supra* note 15, at 596-97.

[23] The court interpreted this subsequent state action as "indicating that the states did not consider their sovereignty affected by the National Act except to the extent that the states had ceded that sovereignty by constitutional grant." Braniff Airways, Inc., v. Nebraska Bd. of Equalization and Assessment, *supra* note 15, at 595. It would seem, however, that an opposite conclusion might have been reached with equal facility; i.e., that the states felt the *need* to make such proclamations of sovereignty in the face of the 1926 act.

[24] Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959).

[25] *Ibid.*

[26] *Ibid.*

[27] "It cannot seriously be contended that a person moving in interstate commerce is on that account exempt from service of process while in transit, and we think it makes no practical difference whether he is traveling at the time on a plane, or on a bus or train, or in his own car." *Ibid.*

purposes of libelling a plane for liquor smuggling, even though the plane did not land in the jurisdiction during the illegal flight, and was not seized by authorities until a later date.[28] Therefore, while *Grace v. MacArthur* may be considered an enlargement of the concept of "territorial limits,"[29] it would seem rather to be another illustration of the adaptability of the common law, and a judicial recognition that because man has learned to fly, he need not thereby leave his terrestrial law beneath him.

Joseph D. Howe

NEGLIGENCE — PROXIMATE CAUSE AND FORESEEABILITY — LIABILITY TO PERSON OTHER THAN ONE FOR WHOM GRATUITOUS DUTY UNDERTAKEN. —Employees of the defendant corporation relied upon its practice to advise them of any abnormalities disclosed by X-rays it gratuitously took of them. Although tuberculosis is known as a communicable disease, the plaintiff-employee was not notified that X-rays made of him indicated he had or was developing the disease. Because he was unaware of his condition, the employee and his wife, the co-plaintiff, failed to take steps to protect her, and she also caught the disease. Upon motion to dismiss, *held*, motion denied. When a duty to perform an act is gratuitously assumed, but not performed, by one who knows his conduct will be relied upon by another, the person undertaking such duty is liable both to the person for whom he assumed the duty and to anyone who foreseeably through association with such person also was injured by failure to perform the act. *Wojcik v. Aluminum Co. of America*, 183 N.Y.S.2d 351 (Sup. Ct. 1959).

Any attempt to establish a universal rule for liability for negligence would meet with utter defeat at its inception. The obvious reason is that rules must vary to meet the exigency of the particular fact situations. However there have been various doctrines or theories developed and utilized by the courts to determine liability in the field of negligence. In the instant case, the court applied the theory of *foreseeability*. Under this theory, *foreseeability* of harm is used to determine *proximate* cause,[1] which is the connecting link between the act done and the resulting harm. The act done, in order to establish liability, must be the

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[28] United States v. One Pitcairn Biplane, 11 F. Supp. 24 (D.C.N.Y. 1935).
[29] See, e.g., 48 GEO. L.J. 170 (1959).

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[1] See, *e.g.*, Nieman v. Jacobs, 347 P.2d 702 (Ariz. 1959); see also United States v. Atlantic Coast Line R.R., 64 F. Supp. 289 (E.D.N.C. 1946); Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928); Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222, 15 N.E.2d 838 (1938).

breach of a *legal duty*[2] owed the injured party. Duty in this respect is an elusive word. Generally, it is thought of as an obligation recognized by law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risk.[3] However, the plaintiff must be within the class to whom the duty is owed.

An analysis of the present case not only discloses the utilization of foreseeability, and indirectly proximate cause[4] and legal duty for determining liability, but it also raises a moot question as to whether a new idea is being developed by the court—that of liability based on relationship.

The legal duty to *disclose* to the plaintiff-employee in the present case was established by the gratuitous undertaking of the defendant to do an act, which if not fully carried out, could and did result in harm.[5] The basis for liability was founded on *foreseeability*[6] of the consequences if the duty was not fully performed. But mere negligence in the air and harm do not establish liability. There must be a breach of the legal duty[7] owed and a causal connection between the breach and the resulting harm. In the instant case, the breach was founded upon the defendant's failure to disclose that a tubercular condition existed in the plaintiff-employee.[8] Thus, having found the legal duty and its breach, the injury to the employee and his wife, it was then only necessary to connect these with proximate cause, as determined by the use of foreseeability.

It would seem that in the principal case, the court has taken the

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[2] See, *e.g.*, Gendler v. Sibley State Bank, 62 F. Supp. 805 (N.D. Iowa 1945); Hilleary v. Bromley, 146 Ohio 212, 64 N.E.2d 832 (1946); MacLeod v. Fox West Coast Theatres Corp., 10 Cal. App. 2d 383, 74 P.2d 276 (1937). For an Arizona case using legal duty, see Scarborough v. Central L. & P. Co., 58 Ariz. 51, 117 P.2d 487 (1941). See also HARPER, TORTS § 68 (1933); PROSSER, TORTS § 35 (2d ed. 1955).

[3] 1 RESTATEMENT, TORTS § 4 (1934).

[4] Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); see also 1 RESTATEMENT, TORTS § 5 (1934) where proximate cause is also referred to as "legal cause."

[5] Wojcik v. Aluminum Co. of America, 183 N.Y.S.2d 351 (Sup. Ct. 1959). The establishment of a *legal duty* to disclose has also been incorporated in 2 RESTATEMENT, TORTS § 325 (1934) where it is stated: "One who gratuitously undertakes with another to do an act or to render services which he should recognize as necessary to the other's bodily safety and thereby leads the other in reasonable reliance upon the performance of such undertaking (a) to refrain from himself taking the necessary steps to secure his safety or from securing the then available protective action by third person, or (b) to enter upon a course of conduct which is dangerous unless the undertaking is carried out, is subject to liability *to the other* for bodily harm resulting from the actor's failure to exercise reasonable care to carry out his undertaking." (Emphasis added.)

[6] Wojcik v. Auminum Co. of America, *supra* note 5, at 357, 358: "The risk of the plaintiff-wife contracting tuberculosis from her husband, when unaware that he was so afflicted, was reasonably foreseeable by the defendant. Such a risk is within the range of probability and apprehension of an ordinary prudent person."

[7] Union Carbide & Carbon Corp. v. Stapleton, 237 F.2d 229 (6th Cir. 1956); Jones v. Stanko, 118 Ohio 147, 160 N.E. 456 (1928); Scarborough v. Central L. & P. Co., *supra* note 2.

[8] Wojcik v. Aluminum Co. of America, *supra* note 5, at 356 where the court cited 2 RESTATEMENT, TORTS § 325 (1934).

duty relationship and enlarged it to include those within the foreseeable area of danger. The plaintiff wife apparently was placed in this area and on the basis of the continguity between husband and wife, the defendant also became liable for injuries caused to her by the consequences of his act. "The defendant's negligent conduct toward the plaintiff-husband under the circumstances was negligence to the plaintiff-wife."[9] Is this a new concept of liability by association or relationship, or a natural consequence of placing the plaintiff-wife within the area of foreseeable danger? The result of the court can probably be justified by saying the consequences of the defendant's act were foreseeable as to the wife's injury, and having established the duty to disclose and the breach thereof, liability results.

Having established liability in the present case as to the plaintiff-wife presents another question of even wider scope in the field of negligence, namely, where should liability cease? Some courts have determined that if the consequences of the act are foreseeable by a reasonably prudent man, then the results are proximate, and if not foreseeable, then the results are remote. It is submitted that the better reasoned cases, as a matter of practical necessity, have concluded that the distinction between *proximate* and *remote* is purely a question of policy.[10]

In the present case foreseeability, as determining proximate cause, was used but the limitations placed thereon do not seem to be drawn clearly. An extension here of foreseeability, through a logical series of causes and effects, could produce an illogical result. Would the defendant also be liable to the child, the servant, the neighbor or the public? As one writer put it, "The conscience of society might be shocked by imposing liability in such a case."[11] This graphically illustrates the problem that has plagued courts through the years. The situation however, does exemplify the necessity of drawing the line somewhere, and saying, beyond *this* point liability must cease regardless of foreseeability.

How far this court would actually go in extending the scope of liability based on proximate cause and foreseeability is a matter of conjecture.[12] That a logical result was reached through the media of foreseeability and proximate cause seems apparent. But the problem of an attempt to define and place limitations thereon seems at present

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[9] Wojcik v. Aluminum Co. of America, *supra* note 5, at 358.

[10] Pfeifer v. Standard Gateway Theater, 262 Wis. 229, 55 N.W.2d 29 (1952). See also 52 MICH. L. REV. *op. cit. supra* note 4.

[11] Pfeifer v. Standard Gateway Theater, *supra* note 10, at 34.

[12] Perhaps an analogy could possibly be drawn between the present case and Ryan v. Central R.R., 35 N.Y. 209 (1866), as modified by Webb v. Rome W. & O.R.R., 49 N.Y. 420 (1872), in which the court placed a limitation on how far it would go in extending liability. If such an analogy is valid then perhaps the reasoning of the court is in part agreement with the conclusion of this article.

no closer to being solved than it was when the courts were first confronted with it. Perhaps ". . . the old words of 'proximate' and 'remote,' with the idea they convey of some reasonable connection between the original negligence and its consequences, between the harm threatened and the harm done . . ."[13] are not bad ones after all.

David L. Grounds

[13] 52 MICH. L. REV. *op. cit. supra* note 4, at 32.

Book Reviews

ARIZONA LAW OF EVIDENCE. By Morris K. Udall.[1] St. Paul: West Publishing Co., 1960. Pp. xiv, 553.

In the less populated states, with consequently few practicing attorneys, it is unusual to have available books concerning the local practice. This situation is especially true in the field of evidence law. In a relatively new state there are many legal questions of both substantive and remedial law unsolved by statutes or court decisions. Although this fact makes for a less provincial bar it also frequently means less certainty in prediction of what the law is.

During a trial there often arises the dilemma of an evidence problem unexpectedly arising, which question necessitates immediate argument and decision, and yet the answer may be in a decision digested not under the title "Evidence" but under "Trial," "Witnesses," "Appeal and Error," "Criminal Law," or even tucked away under a substantive law title such as "Corporations," "Bills and Notes" or some other title apparently unrelated to the subject matter of the case at hand. Therefore, particularly at the trial stage of a case it is possible to overlook a local decision which may be controlling. So a scholarly, well written local book is of inestimable value in the field of evidence law. Morris K. Udall's *Arizona Law of Evidence* is such a book.

This treatise is not merely a manual which states a rule and then cites a local case without comment or criticism. It is in the style of the better recent "hornbooks" by the same publisher, with careful syntheses of the cases in the more difficult fields of the subject and with references to the views of other writers, notably Professors Wigmore and McCormick. Where thought advisable the author offers constructive suggestions for improvements in statutes, rules of court, or decision. Questions which are undetermined by an Arizona statute, court rule, or judicial opinion are not ignored but are discussed and accompanied by footnote references to Wigmore on *Evidence* (3d ed.), McCormick's *Handbook of the Law of Evidence*, treatises on federal practice, and leading cases from other jurisdictions, especially those with American Law Reports annotations. Thus the book affords a quick reference to sources of evidence law outside of Arizona.

Probably the two most difficult areas of evidence law are the hearsay rule with its many exceptions and presumptions. The author shows

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[1] Member, Udall and Udall, Tucson, Arizona.

appreciation of the difficulties involved in both of these fields and recognizes that some of the confusion results from problems of semantics.[2]

This reviewer was pleased to see that the author included a chapter on "Production and Discovery of Evidence—Depositions"[3] notwithstanding these matters arise before trial and could be omitted from a local evidence textbook. Of special recent interest concerning production and discovery of evidence is the discussion of *Hickman v. Taylor*[4] and *Dean v. Superior Court*[5] dealing with discovery of the attorney's "work product."[6]

Some excellent law books have the disadvantage of poor working tools for quickly finding the answers to particular questions. The author has recognized the value of a thoroughly prepared index; his index covers 45 pages. It is both a topical and a descriptive-word method of indexing, with helpful cross-references under the more general topics leading to other headings which are more particularized. There is a 30 page table of cases, a table of statutes, and a table of court rules. These tables give the note number within the particular section where a case, a statute, or a court rule is cited. The tables and the excellent index will afford a rapid means of access to the body of the book; they should be of great aid to the busy practitioner preparing for, or in the midst of a trial.

It is good to see that there is a pocket at the back of the book in contemplation of pocket-part supplements which will keep the treatise current with new developments in evidence law.

It requires courage for an active practitioner of the law, like the author, to write a legal textbook. There may be times when his book will be cited against him by his opposing counsel. Upon such occasions there is the great risk that the court may take the view that the author is more nearly correct as a writer than as an advocate. That unfortunate result happened to both Mr. Remington in a bankruptcy case and Judge Dillon in a municipal corporations case, as related in an opinion of United States District Judge William Clark.[7]

> We do not believe that there are many members of the bar or of the bench who have not at one time or another consulted and/or quoted from Dillon on Municipal Corporations. We do not suppose that in doing so, more than a few were familiar with the remarkable facts of the distinguished author's career as a doctor of medicine, United

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[2] Chapter 11 deals with "Hearsay"; Chapter 12 with "Presumptions." Particularly interesting are § 172, "Res Gestae—A Meaningless Term Analyzed," and § 192 dealing with "Vanishing Presumptions."

[3] Chapter 14.

[4] 329 U.S. 495 (1947).

[5] 84 Ariz. 104, 324 P.2d 764 (1958).

[6] § 12. In this regard, see PFISTER, *Discovery of Attorney's Work Product*, 1 ARIZ. L. REV. 112 (1959).

[7] In re Pinals, 38 F.2d 117 (D.N.J. 1930).

> States circuit judge in the state of Iowa, and finally as leading authority in his chosen branch of the law. An even smaller number probably have heard this story related to the writer of this opinion by his father, a friend and neighbor of Judge Dillon's. In argument before the Supreme Court of the United States, the latter stated some proposition of law to the court. Instantly, opposing counsel was on his feet with a volume of the speaker's work in his hand and the quotation, "I appeal from Philip drunk to Philip sober." (It being understood, of course, that the intoxication referred to was mental, not physical.)
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> The court feels that it can dispose of one of the issues in the case at bar in the same way. With sincere admiration, it compares the text-book on bankruptcy of counsel for the trustee (Mr. Remington) to that of Judge Dillon.

This reviewer can think of only two replies which an author could make when faced with such perplexing predicament: either that he wrote the book in his younger days and has since become better versed in the law, or that the law has made great improvement since he wrote the book. The latter reply seems preferable.

I am especially happy that the book has been published; I have considerable pride in the book because the author was one of my excellent students in the Evidence course; and there is a real need for this treatise on the part of the Arizona practitioners and the future generations of law students in the Evidence course. I read two separate drafts of the book prior to its publication. It is written with unusual clarity of expression; the footnotes are complete with Arizona citations to decisions, statutes, and court rules, which cannot be found elsewhere in a single volume. I do not see how an Arizona practitioner can afford to be without Udall's *Arizona Law of Evidence*.

CLAUDE H. BROWN*

CASES ON PROPERTY. By Ralph W. Aigler, Allen R. Smith and Sheldon Tefft. St. Paul: West Publishing Co. 1960. Two volumes. Pp. xxvi, 909; xxvii, 430.

Like the practice of many other fine arts, the teaching of the law of property involves the existence of numerous points of view relating to the proper technique and approach to the subject matter. This stems from the fact that in most law schools the course in property has a dual function. It is customarily devoted to training the students in the patterns of legal reasoning as well as in the substantive contents and nature of the law.

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* Professor of Law, University of Arizona.

But since there are wide differences of opinion on the nature of the lawyer's function in contemporary society, it is not surprising to find that the literature on the subject —if casebooks on property can be so described — has traditionally displayed a rich and striking divergence in the method of presentation. One need only consider the contrast between Everett Frazer's austere and graceful presentation of the classic common law theorems and the modernistic, brilliantly conceptualistic text-and-problem method employed in the well-known work of Professors Casner and Leach to appreciate how widely casebooks can vary.

Cases on Property by Aigler, Smith and Tefft is the latest version of a widely-used casebook which has gone through repeated editions ever since its initial appearance at about the time of the first world war. The reasons for the book's enduring popularity are not at all hard to discover. In terms of comprehensiveness of coverage alone it has always been without a serious rival; and while the present edition is approximately 350 pages shorter than its predecessor, it still furnishes the most detailed treatment of its subject found in any contemporary work. Equally, the present volume is luminous with the glow of a fine and accurate scholarship. As an instrument for the thorough basic training of young lawyers and for imparting a broad general knowledge of the law of property the book can scarcely be matched.

Those familiar with earlier versions of the book will encounter a number of pleasant surprises upon examining the latest volumes. The more compact nature of the present work can be expected to result in a somewhat more cohesive and tightly-knit classroom presentation, and also to place the instructor in a more flexible position with regard to the allocation of classroom time. A minor point which deserves brief mention is that there has been a change in typographical format to a two-column style of presentation. Accustomed to the use of the 1951 edition, the writer of this review discovered after a short period of adjustment that the change substantially promoted readability. The book is thus physically easy to work with.

More fundamentally, it is apparent the book had received a fine and thorough-going modernization. The general organization of material found in the 1951 edition has been retained, but the entire work has been enriched by the addition of a substantial number of brightly modern cases presenting contemporary developments in a challenging fashion. An excellent illustration is found in the chapter on Gifts. Here the book has struck out exuberantly into fresh ground with the addition of an entire new section devoted to the rapidly-growing body of law involving gifts of corporate stock, federal savings bonds, joint bank account problems, and the like, ending with a consideration of the newly-promulgated Uniform Gifts to Minors Act. This represents the

inclusion of welcome and current material, and to this reviewer, at least, the entire section shines like a bright new penny.

An up-dating of other chapters dealing with personal property has also occurred. Thus, the treatment of Bailments now includes a number of recent decisions reflecting late developments in the field of the bailee's responsibility for damage or loss of a bailed chattel as affected by contractual stipulation. This process has been balanced by the elimination of a number of cases fairly to be described as having become obsolete or as representing unnecessarily narrow points. The chapter on Liens has been substantially shortened; some 14 cases, most of them decided in the nineteenth century, have been eliminated from the new edition or relegated to footnote treatment. While this is a substantial editorial revision, the detail and thoroughness which have always been characteristic of the casebook have not been lessened, since much of the omitted material has been made the subject of a text presentation which is extremely clear and well-organized.

A few other aspects of the personal property material also deserve mention. An interesting innovation has taken place in the presentation of materials on Accession and Confusion of Goods. These chapters have been combined in the current book and the subject matter is treated exclusively by a text-and-problem method. An exceptionally deft interpolation of material is likewise to be noted in the chapter on the law of Finding. Previous editions of the casebook have featured a pair of Oregon cases — *Danielson v. Roberts*[1] and *Jackson v. Steinberg*[2] — presenting sharply contrasting results in contests between a landowner and his employee over the right to lost articles found on the premises. In the classes taught by this reviewer, this particular pair of cases has normally aroused vigorous discussion and this segment of the course has seemed particularly "teachable." The new edition supplements these cases by two additional Oregon decisions illustrating a gradual modification in the views of the Oregon Supreme Court from the original decision to the later holding which is diametrically opposed. It thus affords a fine opportunity for examination of the philosophy of *stare decisis* early in the course. While this is a minor change, it is typical of what has occurred throughout the casebook.

Of course it is the material on real property which is of greatest interest and importance. Here, too, the organization of material found in the 1951 edition has been substantially retained. The casebook leads into the field of land law by way of an initial study of methods of conveying interests in real property, commencing with contracts for the sale of land and moving on to common law conveyances, with early

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[1] 44 Ore. 108, 74 Pac. 913 (1904).
[2] 186 Ore. 129, 200 P.2d 376 (1948).

emphasis on the Statute of Uses, and a rapid transit on through into the law surrounding the modern deed. The arrangement in the present volume seems to allow a technically smoother logical development of this subject matter than did the 1951 edition,[3] due in part to a transfer of material and also to a careful job of text presentation in connection with the introductory cases. It should be added that the material is arranged in a fashion which makes it easy and convenient to commence the study of real property through the subject matter of Estates, if the instructor happens to prefer that alternative.[4]

The general reaction of this reviewer to the real property materials is that most of what was good in the earlier edition has been kept, but that throughout these chapters there has been a skillful upgrading and re-editing of material which make the book a more effective classroom document. Typical is the presentation of the Statute of Uses, which is nicely supplemented in this volume by text-and-problem material. The materal on delivery of deeds has been extensively re-worked to make room for contemporary cases. The subject matter of acceptance of deeds is treated textually. The chapter on Boundaries has been at once shortened and sharpened in the incisiveness of its treatment.

The treatment of the law of estates in this casebook has always been good, and the current edition carries on the fine tradition of its predecessors. Most of the new cases in this portion of the book have been decided in the nineteen-forties or fifties and represent current problems of broad general interest. The treatment of concurrent estates has been substantially expanded and broadened. In deference to the current vogue of presenting Future Interests as a separate course, the casebook does not treat this subject in detailed fashion. It does, however, continue the fine text treatment of the subject matter which characterized the previous edition. The material on recordation which was a strong point of the 1951 edition has also been left without substantial alteration, though many new references have been added.

An examination of Volume 2 also reveals a number of noteworthy changes. The subject of water rights has been expanded to reflect the growing interest in the field. The chapter on Statutory Regulations in

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[3] The 1951 edition of the casebook contained a presentation of this introductory material which seemed a little unfortunate, since virtually the first cases to which the students were led — in a chapter devoted to methods of conveyance — dealt with surrender of leasehold estates by operation of law. While these cases possessed a certain logical relevance in such a context, it has never seemed to the reviewer it was of sufficient degree to warrant extensive treatment at that portion of the course. In the current edition these cases have been shifted to where they properly belong and appear in the sections dealing with the landlord-tenant relationship. Unquestionably this will operate to clarify an involved subject matter.

[4] The reviewer is among the instructors who have preferred to follow this course. The book is excellently suited for this type of approach.

the prior edition has also witnessed a substantial editing. It is now entitled "Building Codes, Zoning, Planning, Renewal," and at an estimate is now 60 percent new material, most of this consisting of cases decided within the past six or seven years. In particular, cases dealing with retroactive zoning and the elimination of non-conforming uses found in the 1951 edition have been supplanted by newer decisions giving these problems a far deeper and analytical consideration. Similarly, the chapter on Real Covenants is almost entirely new in approach and contains a high percentage of current decisions.

This is a major American casebook, and it is almost impossible to summarize it adequately in a review. If any single feature were to be singled out as distinguishing this work from others in the field, this reviewer would consider it to be the balanced nature of the coverage it affords. It is a work of enormous scholarship and depth; the wealth of collateral citations it contains would alone give it functional utility as a source of reference. But it is far more than a mere repository of references. The careful selection of cases, the fine and analytical treatment it gives to the field of property, the judgment exercised in blending the treatment of fundamental principles with the latest developments in the entire field, all combine to make it an exceptional tool for the instructor and a valuable addition to the student's library. Indeed, the practicing attorney in search of a compact summary of the American case law in the field of real property could search much farther and find much less.

CHARLES LIEBERT CRUM*

DELAY IN THE COURT. By Hans Zeisel, Harry Kalven Jr. and Bernard Buchholz. Boston: Little, Brown and Co., 1959. Pp. xxvii, 313. $7.00.

Under a grant from the Ford Foundation three members of the University of Chicago law faculty have here produced, after five years of research, this first volume in a series on the jury and court administration. Since the book attacks a problem with wide impact in the United States, it should receive seious attention from the legal profession, from social scientists, and from legislators in order to identify the issues involved in court delay, and to test the assertions or recommendations made with respect to their reduction or elimination.

The text is elaborately illustrated with diagrams, charts, and statistical tables in proof of statements made so that very little is taken for granted. This empirical method would have greater general validity, however, if the figures used came from a wider base. As the introduction

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* Professor of Law, University of North Dakota.

states: "This book is an effort to aid in the solution of this problem by a detailed study of delay and what might be done about it, in a single court system, the Supreme Court of New York County, that is, Manhattan." Furthermore, in that court, delay in the trial of cases occurs almost exclusively as to jury cases for personal injury, because of a system of giving trial preference to commercial, criminal, and non-jury actions.

Some distortion, therefore, is recognized by the authors and occasionally data is introduced from New Jersey, Philadelphia, and Chicago to give contrast to the New York findings. However, the excellent methods of research used could be applied by other investigators as to conditions in any other state or locality, and while there might be some variance in results for specific charts or tables, the answers to basic questions probably would not differ greatly.

In the Manhattan courts studied, 71 per cent of all suits filed were settled without trial, and disposition of these cases requires only 16.2 per cent of total court time. The problem of remedies for delay, therefore, is one affecting a minority of cases taking up a majority of the judge time, and it is discussed under three main headings: Remedies designed—

1. to speed up the trial process;
2. to increase the ratio of cases settled;
3. to augment the judge power available.

To speed up the trial process. Since jury trials are shown to take longer by a 5 to 3 ratio than cases tried only to a judge, a considerable savings in trial time, or judge time, might be effected by encouraging non-jury trials. Three possibilities are discussed: first, to abolish the jury for negligence actions; second, to increase jury waiver by pricing the jury out of reach, or by adopting the rule of comparative negligence; third, to stimulate use of pre-trial devices to encourage settlements or jury waiver, or at least to cut down on issues necessary to be examined before a jury.

To increase the ratio of cases settled. Here again, several practical suggestions are offered as tending to reduce delay: first, the use of impartial medical experts drawn from a panel in personal injury cases, as provided in the Model Expert Testimony Act (Uniform Laws) and by Rule 35 of the Federal Rules of Civil Procedure and already adopted in South Dakota; second, allowing interest to run in tort cases not from the traditional date of final entry of the award but from the time of filing suit (three states—Colorado, Louisiana, and Massachusetts—are cited as already awarding interest from the time of suit, and Virginia as permitting it under jury discretion); third, a further elaboration of the possibilities within the scope of pre-trial devices toward reducing court time devoted to trial, both non-jury and jury.

To augment the judge time available. And here several possibilities are seen. First, in the New York study, with trial parts of the court in session ten months out of the year, with official and semi-official holidays deducted, and with further allowance made for illness, religious holidays, and miscellaneous personal reasons, it was found that the number of trial days per judge was approximately 170 during a year. Of course, such figures would show considerable variation in other jurisdictions; for instance, the comparable number of days in New Jersey is shown to be 184 days. Changes in statutes or custom and pressure from the public could improve this situation. Second, in New York the average number of hours in a trial day spent on trial work was found to be only 4.1 hours, due in part to factors personal to the judge and in part to gaps in the scheduling system. Improvement in both regards could follow judicial attention focused on productive industry. Under a third heading called "Enlarging the Trial Bar," is discussed the evil of freely granted continuances because a lawyer with multiple trial clients is scheduled in two or more courts at the same time; and the recommended cure is that busy trial lawyers be required to have assistants ready to take over when conflict in scheduling occurs. As observed, every litigant is entitled to be represented by counsel of his own choosing, but not necessarily so many litigants by so few counsel that the business of the courts is delayed. A final suggested method of augmenting judge time and thereby decreasing calendar delay is simply to have more judges, and in many instances this may be the advisable remedy to promote. However, there are always factors of public finance, the local political situations, and other imponderables which enter the picture on this proposal.

This book deserves careful study from those who would attack the problem of delay in the court. Further volumes in the series may be awaited with interest.

FLOYD E. THOMAS, J.D.*

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* Professor Emeritus of Law, University of Arizona.